(10)

No. 90-1342-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Jairo Jonathan Elias Zacarias

Docketed:
February 25, 1991

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Von Mehren,Peter A.

Entry	Date	Note	Proceedings and Orders
1	Feb 25 1991	G	Petition for writ of certiorari filed.
3	Mar 11 1991		Order extending time to file response to petition until April 19, 1991.
4	Apr 19 1991		Brief of respondent Zacarias in opposition filed.
5	Apr 24 1991		DISTRIBUTED. May 9, 1991
6	May 3 1991	X	Reply brief of petitioner INS filed.
7	May 13 1991		Petition GRANTED.
			**********
8	May 24 1991	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
9	Jun 3 1991		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
10	Jun 27 1991		Brief of petitioner INS filed.
12	Jul 16 1991		Order extending time to file brief of respondent on the merits until August 14, 1991.
16	Aug 13 1991		Brief amicus curiae of American Immigration Lawyers Association filed.
13	Aug 14 1991		Brief amicus curiae of Office of the Unite Nations High Commissioner for Refugees filed.
14	Aug 14 1991		Brief of respondent Zacarias filed.
15	Aug 14 1991		Brief amici curiae of Lawyers Committee for Human Rights, et al. filed.
18	Aug 14 1991		Record filed.
		*	Received record (not certified) from USCA 9.
17	Aug 21 1991		CIRCULATED.
20	Sep 5 1991		Lodging received.
21	Sep 13 1991	X	Reply brief of petitioner INS filed.
22	Nov 4 1991		ARGUED.
19	Nov 5 1991		SET FOR ARGUMENT MONDAY, NOVEMBER 4, 1991. (1ST CASE)

1PP

90-1342

No.

Supreme Court, U.S.
FILED
25
FEB 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The Refugee Act of 1980 requires an alien seeking asylum to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), 1158(a). The question presented is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution "on account of" that person's political opinion.

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	22
Appendix A	1a
Appendix B	26a
Appendix C	27a
Appendix D	34a
Appendix E	37a
Appendix F	39a
Appendix G	43a

TABLE OF AUTHORITIES

Cases:

Alonzo v. *INS*, 915 F.2d 546 (9th Cir. 1990)	16, 17
Alvarez-Flores v. *INS*, 909 F.2d 1 (1st Cir. 1990)	14
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	11, 19, 20
City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983)	21
Fort Stewart Schools v. *FLRA*, 110 S. Ct. 2043 (1990)	20
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	6, 11, 17, 18, 20, 21
INS v. *Stevic*, 467 U.S. 407 (1984)	6
M.A. A26851062 v. *INS*, 899 F.2d 304 (4th Cir. 1990)	20
Maldonado-Cruz, In re, Interim Dec. 3041 (B.I.A. 1988)	13
Maldonado-Cruz v. *INS*, 883 F.2d 788 (9th Cir. 1989)	7, 13
Massachusetts v. *Morash*, 490 U.S. 107 (1989)	20
Mendoza Perez v. *INS*, 902 F.2d 760 (9th Cir. 1990)	19

Cases—Continued: Page

Pension Benefit Guaranty Corp. v. *LTV Corp.*, 110 S. Ct. 2668 (1990) 20
Perlera-Escobar v. *Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990) 8, 9, 10, 11, 12, 13, 19, 20
Sullivan v. *Everhart*, 110 S. Ct. 960 (1990) 20
Umanzor-Alvarado v. *INS*, 896 F.2d 14 (1st Cir. 1990) 14
Vigil, In re, Interim Dec. 3050 (B.I.A. 1988) 13

Treaties, constitution, statutes, and regulation:

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 152 18
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6225, T.I.A.S. No. 6577 18
International Refugee Organization Const., Annex 1, Pt. 1, 62 Stat. 3037:
§ A1(a)-(c), 62 Stat. 3049 18
§ A3, 62 Stat. 3049-3050 18
§ C1(a)(i), 62 Stat. 3050 18
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 20
§ 302, 104 Stat. 5030 20
§ 302(b)(1)(A), 104 Stat. 5031 (8 U.S.C. 1254a) 21
§ 302(b)(2)(B), 104 Stat. 5032 21
Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:
§ 101(a)(42), 8 U.S.C. 1101(a)(42) 2, 43a
§ 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) 2, 8, 14, 15, 43a
§ 208(a), 8 U.S.C. 1158(a) 2, 16, 44a
§ 209, 8 U.S.C. 1159 21
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 2
8 C.F.R. 208.13 16

Miscellaneous: Page

1988 Statistical Y.B. INS (Aug. 1989) 20
Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681 (1989) 15
S. Conf. Rep. No. 590, 96th Cong., 2d Sess. (1980) 18
S. Rep. No. 256, 96th Cong., 1st Sess. (1979) 18

In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals, App., *infra*, 5a-25a, is reported at 921 F.2d 844. The initial opinion of the court of appeals is reported at 908 F.2d 1452. The opinion of the Board of Immigration Appeals denying respondent's motion to reopen his deportation proceeding, App., *infra*, 27a-33a, is unreported. The opinion of the Board of Immigration Appeals denying respondent's motion for reconsideration of its dismissal of respondent's appeal, App., *infra*, 34a-36a, is unreported. The opinion of the Board of Immigration Appeals dismissing respond-

ent's appeal, App., *infra*, 37a-38a, is unreported. The oral opinion of the Immigration Judge, App., *infra*, 39a-42a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A petition for rehearing was denied on January 10, 1991. App., *infra*, 26a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Refugee Act of 1980, added to the Immigration and Nationality Act of 1952 as Sections 101(a)(42) and 208(a) and codified at 8 U.S.C. 1101(a)(42) and 1158(a), are reproduced at App., *infra*, 43a-44a.

STATEMENT

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, limits eligibility for asylum to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). A "refugee" is defined to be any person who is unwilling to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

Respondent Jairo Jonathan Elias Zacarias left his native Guatemala after two masked guerrillas armed with machine guns asked him to join their army and, when he declined to join, told him to "think it [over] well." App., *infra*, 6a-7a. In his deportation proceeding, respondent applied for asylum and withholding of deportation on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion.

The Immigration Judge and the Board of Immigration Appeals denied the requested relief because the guerrillas did not threaten to harm respondent if he refused to join them, and because any implicit threat was not "on account of" his political opinion.

The Ninth Circuit reversed and found respondent eligible for asylum. It held that the Guatemalan guerrillas' practice of forcible recruitment made it reasonable for respondent to take the admonition to "think it [over] well" as a threat. App., *infra*, 17a. Moreover, that threat was "properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Id* at 12a. On the basis of its conclusion that respondent was a "refugee" within the meaning of the 1980 Act, the court of appeals remanded for the BIA to determine whether respondent should be granted asylum. *Id.* at 25a.

1. Respondent is a nineteen-year-old man who left his native Guatemala in March 1987, a few months after two masked guerrillas came to his home. The guerrillas were armed with machine guns and asked respondent to join their army. Respondent refused to join, even though the guerrillas offered to pay him to fight for them. The guerrillas told respondent to "think it [over] well" and said that they would be back. Respondent remained at home and continued to work at his regular job for the next two months before he decided to leave Guatemala for the United States. App., *infra*, 6a-7a, 32a, 40a-41a; C.R. at 37.

2. Respondent was apprehended for entering the United States without inspection. In his deportation hearing, respondent conceded his deportability and requested asylum and withholding of deportation. App., *infra*, 40a.

The Immigration Judge denied the requested relief. "Considering all the evidence," the Immigration Judge determined that "it does not appear that the respondent has established that he is a refugee within the meaning of 101(a)(42) of The Act" because he has "failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." App., *infra*, 41a-42a.

3. The Board of Immigration Appeals (BIA) summarily dismissed respondent's appeal when his counsel failed to file a brief or statement on his behalf. App., *infra*, 38a. Respondent then moved the BIA to reconsider its dismissal. The BIA denied the motion for reconsideration; treating the motion as one to reopen respondent's deportation proceeding, it denied the motion because "there has been no evidentiary showing by the respondent that would warrant the relief originally requested, or that the decision of the immigration judge would be reversed." *Id.* at 36a.

Respondent then moved the BIA to reopen his deportation proceeding and to consider new evidence in support of his appeal. The new evidence was a letter from respondent's father saying that the guerrillas visited the family's home twice since respondent left Guatemala: once in January 1988, and again in April 1988. In the January visit, the guerrillas asked for respondent's father and mother and left when they found that the father was not at

home. In the April visit, the guerrillas asked for the respondent, but were told that he was in the United States. Both visits were for the purpose of attempting to recruit respondent. App., *infra*, 31a.

The BIA determined that the letter from respondent's father "not only has failed to sustain his burden for reopening, * * * but also has failed to produce evidence that would establish a well-founded fear of persecution under the Act." App., *infra*, 31a. "Even though the respondent alleges that he was threatened by the guerrillas, the evidence of record does not bear this out"; "there was no threat made to the respondent that he would be harmed if he refused to join them." *Id.* at 32a. Even if the guerrillas threatened respondent, the BIA held, it was for the purpose of satisfying their need for soldiers and not "on account of" any political opinion held by respondent:

> [I]n our decisions in *Matter of Vigil*, Interim Decision 3050 (BIA 1988), and *Matter of Maldonado*, Interim Decision 3041 (BIA 1988), we opined that when a guerrilla organization attempted to recruit someone, the initial encounter was important to examine in order to determine the motivations of the guerrillas. In this case, the guerrillas wanted the respondent to join them, and according to respondent's father, even offered to pay the respondent for his services. In respondent's brief in support of his latest motion, he acknowledges that the subsequent visits by the guerrillas were also an attempt to recruit him in order for him to assist the guerrillas in their attempt to violently overthrow the Guatemalan Government. It can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive.

Id. at 32a-33a. The BIA concluded that respondent "failed to show, by his new evidence, a *prima facie* eligibility for asylum or that the results of respondent's deportation hearing would be changed." *Id.* at 33a. Accordingly, it denied the motion to reopen. *Ibid.*

4. The Ninth Circuit reversed. App., *infra*, 5a-25a. It found respondent eligible for asylum, based on the evidence presented to the immigration judge, on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion. *Id.* at 6a. At the same time, the court held that the letter from respondent's father did not require the BIA to reopen the deportation proceeding with respect to his withholding of deportation claim. *Ibid.*[1]

At the suggestion of petitioner's counsel, the court of appeals treated the BIA's final ruling as both an affirmance of the Immigration Judge's denial of relief and as a denial of respondent's motion to reopen his deportation proceeding. App., *infra*, 6a & n.2. The court first reviewed the BIA's affirmance of the decision of the Immigration Judge. The court noted that the record before the Immigration Judge included an advisory opinion from the State Department on the merits of respondent's application for relief. *Id.* at 7a. Although the letter advised that respondent was *not* a refugee, *id.* at 7a, the court read it to support respondent's claim that "the guerrillas engage in forced recruitment." *Id.* at 8a. "Because nongov-

[1] An alien found eligible for withholding of deportation is entitled, without more, to that relief. An alien found eligible for asylum may still be denied that status in the discretion of the Attorney General. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987); *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

ernmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution." *Id.* at 12a. "The persecution is properly categorized as 'on account of political opinion,'" according to the court, "because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Ibid.* (citing, *inter alia*, *Maldonado-Cruz* v. *INS*, 883 F.2d 788, 791 (9th Cir. 1989)).

Turning to the facts of the case before it, the court of appeals found that respondent was eligible for asylum but not for withholding of deportation. App., *infra*, 16a. "[I]n light of the guerrillas' practice of using force to recruit people, it certainly was reasonable for a person in [respondent's] situation to take the statements [to 'think it [over] well'] as threats." *Id.* at 17a. "Finally, the threat to [respondent] was for political as opposed to personal reasons; the Board did not suggest that the individual guerrillas who appeared at his door had a personal quarrel with [respondent], and in any event, there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [respondent] to further the *group*'s political goals. There was thus a reasonable possibility, based on the evidence presented [to the Immigration Judge], that the guerrillas would return and take [respondent] by force, thereby persecuting him on account of political opinion." *Id.* at 18a.

The court noted that respondent's evidence "failed to prove the 'clear probability' of persecution necessary to obtain withholding of deportation." App., *infra*, 18a. It further observed that the letter from petitioner's father "did not cure the key deficiency

in his withholding of deportation claim"—*i.e.*, the lack of specific evidence demonstrating that "forced recruitment was more than a reasonable possibility." *Id.* at 25a. Accordingly, the court upheld the BIA's denial of respondent's application for withholding of deportation, but remanded the case so that the BIA could exercise its discretion whether to grant respondent's asylum application. *Ibid.*[2]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit in this case held that forced recruitment by guerrillas is "persecution on account of * * * political opinion," and that recruits are eligible for asylum on that basis. 8 U.S.C. 1101(a)(42)(A). This holding—which the court applied in the absence of any evidence that the recruitment was intended to inflict harm on the recruit for his political opinions, rather than simply to enlist soldiers—conflicts with the decision of the Eleventh Circuit in *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292 (1990) (per curiam).

The Ninth Circuit's holding disregards the Refugee Act's requirement that persecution be "on account of * * * political opinion." 8 U.S.C. 1101(a)(42)(A). The quoted phrase requires proof, direct or circumstantial, that the persecutor's act is motivated by the desire to inflict harm on the victim "on account of" a "political opinion" to which the persecutor objects. The statutory eligibility requirement is not satisfied by the observation that the alleged persecutor is politically motivated. The fact that the

[2] Before denying a petition for rehearing, App., *infra*, 26a, the panel issued an order amending its opinion, *id.* at 2a-5a. The opinion reprinted in the Appendix, *id.* at 5a-25a, incorporates these amendments.

guerrillas intended to conscript respondent in order to further their political goal of overthrowing the government of Guatemala, see App., *infra*, 12a, 18a, does not qualify as "persecution on account of * * * political opinion."

By expanding that phrase to encompass forced conscription by political factions, the Ninth Circuit has opened eligibility for asylum to every candidate for military service in countries torn by domestic strife. Needless to say, the class of such persons is large. The looming burden for the INS in processing applications from such individuals, and for the Nation in assimilating them into society, necessitates this Court's review.[3]

1. The Ninth Circuit's decision in this case conflicts with the decision of the Eleventh Circuit in

[3] In another pending case, *Immigration and Naturalization Service* v. *Canas-Segovia*, No. 90-1246 (filed Feb. 6, 1991), we have petitioned for certiorari from a decision of the Ninth Circuit holding that a conscientious objector who fears punishment by the government of El Salvador for resisting universal military service is eligible for both asylum and withholding of deportation. Like this case, *Canas-Segovia* raises an important question of the meaning of "on account of" in the Refugee Act. But the issues are in substantial respects sufficiently different—here, the significance of the political objectives of a guerrilla group and in *Canas-Segovia* the significance of the conscript's conscientious objection to government-required military service—that we believe both decisions warrant plenary review. Moreover, a decision in either case would not necessarily govern disposition of the other case. For example, an opinion in *Canas-Segovia* holding that the "on account of" language requires proof of the persecutor's intent may not be determinative on the question whether an intent to pursue a political objective, which the Ninth Circuit found in the decision below, constitutes an intent to persecute on account of a "political opinion" within the meaning of the Refugee Act.

Perlera-Escobar v. *Executive Office for Immigration*, 894 F.2d 1292 (1990). Escobar was a deserter from a guerrilla force who feared punishment for his defection. *Id.* at 1294. Initially, Escobar had sought the guerrillas' protection from a Salvadoran "death squad." *Ibid.* According to Escobar, the guerrillas took him to their camp "where, against his will, he was trained and 'incorporated' into the guerrilla group." *Ibid.* During his nine months with the guerrillas, Escobar witnessed the execution of two guerrillas suspected of attempting to escape. *Ibid.* Nevertheless, Escobar deserted because he was "politically neutral" and did not want to fight against his fellow countrymen. *Id.* at 1294 & n.1. Two months after his escape, two guerrillas told Escobar that "the guerrilla commander had issued orders for his arrest." *Id.* at 1294. The guerrillas were still looking for Escobar after he had entered the United States. *Ibid.* At his deportation hearing, Escobar testified that "he would be killed by the military upon arrival in San Salvador because the army knew he was a guerrilla, and that he would be killed by the guerrillas because of his desertion." *Ibid.*

The Board of Immigration Appeals concluded that Escobar was not eligible for asylum because the punishment Escobar feared was not "persecution on account of political opinion"; "there was no evidence that the guerrillas' motivations to harm him are other than the need to discipline and deter desertion by its members." 894 F.2d at 1295.

The Eleventh Circuit agreed that the guerrillas' efforts to field and retain combat troops did not constitute "persecution on account of * * * political opinion" and affirmed the BIA's denial of relief to Escobar. 894 F.2d at 1296-1299. The court noted at the outset its "oblig[ation]" to defer to the BIA's

"construction of the phrase 'on account of . . . political opinion' * * * if that interpretation is reasonable." *Id.* at 1296. The court observed that "[t]he meaning and scope of the phrase 'on account of . . . political opinion' is not defined by the Act, nor does it appear from the legislative history that Congress unambiguously expressed an intent that the term should be construed in a particular way." *Ibid.* Since the Refugee Act did not define the statutory phrase, the court concluded that it must give "considerable weight" to the BIA's interpretation and may not substitute its own construction for the reasonable interpretation of the BIA. *Ibid.* (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), and *INS* v. *Cardoza-Fonseca*, 480 U.S. at 448).

The Eleventh Circuit found reasonable "[t]he BIA's determination that the need to discipline and silence deserters is not persecution on account of 'political opinion' within the meaning of the Act." 894 F.2d at 1298. The court reasoned that "[a] finding of persecution requires some degree of intent on the part of the alleged persecutor to harm the applicant in order to overcome a belief of the applicant." *Ibid.* No such intent was established by Escobar:

> In the absence of any evidence that the guerrillas are interested in him for political reasons, the BIA inferred from the record that Escobar is nothing more than a deserter. The record makes it apparent that the guerrillas are a paramilitary organization exercising control and discipline over its members. *It is also apparent that the guerrillas often rely on coercion to recruit soldiers who would not otherwise join them.* From these facts the BIA inferred that in order to maintain order and promote loyalty from its

> members, the guerrillas must discipline deserters. Without such measures the guerrillas would perish when, as is inevitably the case, the spirit of its fighters wanes. In this respect the guerrillas are similar to any military organization that punishes deserters in order to maintain unity. Moreover, the guerrillas also have an interest in preventing Escobar from divulging their secrets to the government or government-backed groups. Even Escobar admits that the guerrillas are interested in him because of what he knows. *Simply, the guerrillas care not what Escobar thinks or believes; rather their interest in him stems from their need to preserve unity and order in their ranks and to ensure the secrecy of their operations.*

Ibid. (emphasis added). The Eleventh Circuit rejected the contention—accepted by the Ninth Circuit in this case—that because the guerrillas have political objectives, the statutory requirement that persecution be "on account of * * * political opinion," *id.* at 1299, is satisfied; to accept that argument, the Eleventh Circuit pointed out, "would entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum." *Id.* at 1299 n.5.[4]

The reasoning of the Ninth and Eleventh Circuits is diametrically opposed. The Ninth Circuit held that "[t]he persecution is properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." App., *infra*, 12a (citing, *inter alia*, *Maldonado-Cruz* v. *INS*, 883 F.2d 788, 791 (9th Cir. 1989)). The Eleventh Circuit flatly rejected that analysis when it held that "the fact that * * * the guerrillas are fighting to achieve political objectives does not imbue every act committed by them with political significance. Escobar may well fear persecution on account of what he believes to be political opinion. However, in the context of civil war where fear permeates the life of every citizen, the motivation of the persecution becomes the linchpin of the analysis." 894 F.2d at 1299.[5]

The fact that respondent was threatened with forcible recruitment, while Escobar was threatened with punishment for desertion, does not distinguish the two cases.[6] Both men faced threats of harm for fail-

[4] The Eleventh Circuit noted that its holding—that the guerrilla group's pursuit of Escobar for desertion was not "persecution on account of * * * political opinion"—did not disqualify all former guerrillas from eligibility for asylum. 894 F.2d at 1299. The applicant for asylum need only "demonstrate through evidence in the record, that the guerrillas pursue him to overcome a recognized political opinion." *Ibid.*

[5] The conflict between the Ninth and Eleventh Circuits is reflected in their use of authority. The Eleventh Circuit, 894 F.2d at 1297, spoke approvingly of the BIA's decisions in *In re Maldonado-Cruz*, Interim Dec. 3041 (1988), rev'd, 883 F.2d 788 (9th Cir. 1989), and *In re Vigil*, Interim Dec. 3050 (1988), and the BIA relied on those decisions in this case, App., *infra*, 32a. The Ninth Circuit reversed the BIA in this case, and relied on its opinion reversing the BIA in *Maldonado-Cruz*, App., *infra*, 12a. The Eleventh Circuit said that the BIA's opinion in *Maldonado-Cruz*—and not the Ninth Circuit's—is still "persuasive" in the Eleventh Circuit. 894 F.2d at 1297 n.4.

[6] Although the Eleventh Circuit mentioned that "Escobar was not forcibly recruited," 894 F.2d at 1297 n.4, it spoke approvingly of the BIA's decision in *In re Vigil*, Interim Dec. 3050 (1988), which held that "forced recruitment by either the guerrillas or the government does not constitute fear of persecution 'on account of political opinion.' " 894 F.2d 1297.

ing to comply with a guerrilla group's demand to serve in its armed forces. Both threats were motivated by the guerrillas' desire to field a military force to achieve the group's political objectives, not by a desire to harm the aliens "on account of" any "political opinion." If the threat to respondent was "on account of * * * political opinion," so too was the threat to Escobar.[7] Indeed, the death threat to Escobar was far more grave, and more credible (in light of the two executions Escobar witnessed and the guerrilla leader's order to arrest him), than the threat that prompted respondent to flee Guatemala.

2. The Ninth Circuit's expansion of asylum eligibility—from aliens facing "persecution on account of * * * political opinion" to aliens facing a threat of harm motivated by political *objectives*—overrides the statutory limit on refugee status and trenches on the deference owed to the BIA's reasonable interpretation of the Refugee Act.

a. A "well-founded fear of persecution on account of * * * political opinion," 8 U.S.C. 1101(a)(42)(A), plainly requires an intent to discriminate against a

[7] The Ninth Circuit's determination that respondent is eligible for asylum also conflicts in principle with decisions of the First Circuit requiring proof that persecution is intended to punish a political opinion. See *Umanzor-Alvarado* v. *INS*, 896 F.2d 14, 15 (1990) ("Insofar as this evidence shows that the Government [of El Salvador] may punish [the applicant] simply because he will not serve in the Army, however, it does not show that the Government will *persecute* him because of his *political opinion*."); see also *Alvarez-Flores* v. *INS*, 909 F.2d 1, 6 n.4 (1st Cir. 1990) ("Apparently only the Ninth Circuit has determined that mere refusal to join the guerrillas is itself a manifestation of neutrality within the meaning of the [Refugee] Act.").

person because of his political beliefs.[8] A guerrilla group's impressment of soldiers is not necessarily motivated by that intention. It is true that forcible conscription by a guerrilla group has a political goal. It is also true that a person confronted with a credible threat of forcible conscription may have a well-founded fear of physical injury or worse if he does not go voluntarily. But those two facts, which, at best, are all the respondent established in this case, do not satisfy the statutory requirement that limits eligibility for asylum to persons with a "well-founded fear of persecution on account of * * * political opinion." 8 U.S.C. 1101(a)(42)(A).

The Ninth Circuit reasoned that "[t]he persecution is properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." App., *infra*, 12a. Because "there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [respondent] to further the *group*'s political goals," respondent would be persecuted "on account of political opinion." *Id.* at 18a.

If the Ninth Circuit means that a threat made to achieve a political *objective* is equivalent to persecution on account of political *opinion*, that is simply not true. A person might be entirely sympathetic to the goals of the guerrillas, and share every one of their political beliefs, but not want to serve in their

[8] See Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681, 700 (1989) (Refugee Act requires that "the persecutor seeks to punish [the alien] for holding a specific political belief").

army. That person is faced with the same threat of forcible conscription as one who is entirely hostile to the guerrillas' program. Conversely, a person might share none of the guerrillas' views but be happy to sign for a decent wage. It should be obvious that neither of those persons has any fear of "persecution on account of * * * political opinion."

If the Ninth Circuit is suggesting that a threat must be presumed to be on account of political opinion unless the INS presents evidence to the contrary, such a presumption (or inference[9]) likewise has no basis in fact and is contrary to the Refugee Act. Section 208(a) of the Act vests in the Attorney General the authority to establish an asylum procedure, 8 U.S.C. 1158(a), and the procedure he has established requires the alien to bear the burden of proving his eligibility for relief, 8 C.F.R. 208.13. Since a guerrilla group may well seek to recruit young men in order to field a fighting force, not to persecute those men for their political opinions, the Attorney General's refusal to recognize such a presumption is plainly appropriate.[10]

---

[9] In response to the government's petition for rehearing, which questioned the panel's use of a presumption, Gov't Reh'g Pet. 7, the panel deleted the word "presumption" and substituted the word "inference." See App., *infra*, 5a. Compare 908 F.2d at 1458 with App., *infra*, 18a.

[10] Another panel of the Ninth Circuit has read the decision below as "recogniz[ing]" that an alien may establish persecution from a non-governmental guerrilla group " 'on account of' political opinion without any expression of political belief greater than a mere refusal to join the group." *Alonzo* v. *INS*, 915 F.2d 546, 549 (1990). The panel described the decision here as one of a series in which the Ninth Circuit has "regularly presumed that an alien's refusal to join a guerilla group, without more, constitutes an expression of political neutrality sufficient to alert the guerillas of the alien's political beliefs." *Ibid.* The panel criticized this rule because it "ignores the possible existence of other reasons for refusing to join a guerilla group which are not on 'account of' political or religious reasons," including "cowardice, or a desire to invest in his business." *Ibid.* For this reason, the panel refused to extend it to cases of government conscription, but it could not reject it for cases of conscription by non-governmental groups. *Ibid.*

b. The flaw in the Ninth Circuit's opinion in this case is not simply a matter of words; it goes to the heart of the purpose of the Refugee Act. It was the goal of that statute to extend eligibility for asylum not to all victims of coercion, or even terror, but only to those who were threatened with persecution for certain reasons. Refusal to serve in someone's army is not one of those reasons.

The international agreements from which Congress drew the definition of "refugee" in the 1980 Refugee Act support the reading of "on account of * * * political opinion" as a limitation on asylum eligibility to those who are harmed or threatened with harm for their political beliefs. The definition of "refugee" in the 1980 Refugee Act originated in the 1946 Constitution of the International Refugee Organization (IRO). See *INS* v. *Cardoza-Fonseca*, 480 U.S. at 437. Responding to persecution perpetrated by the fascist powers before and during World War II, the IRO defined as "refugees" those persons who were outside their native country and were "victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war"; "Spanish Republicans and other victims of the Falangist regime in Spain"; and "persons who were considered refugees before the second world war, for reasons of race, religion, nationality or political opinion."

IRO Const., Annex 1, Pt. 1, § A1(a)-(c), 62 Stat. 3049. The IRO also defined as refugees "persons of Jewish origin or foreigners or stateless persons" who were returned to their native country by "enemy action" and became "victims of nazi persecution." IRO Const., Annex 1, Pt. 1, § A3, 62 Stat. 3049-3050. The IRO allowed refugees to decline to be repatriated to their native country if, among other reasons, they claimed "persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions." IRO Const., Annex 1, Pt. 1, § C1(a)(i), 62 Stat. 3050.

The IRO definition of refugee was incorporated in the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 152, whose definition of "refugee" was in turned revised in the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6225, T.I.A.S. No. 6577, to apply to persons who became refugees after January 1, 1951. The United States acceded to the Protocol in 1968. 19 U.S.T. 6257. In 1980, Congress, in enacting the Refugee Act, conformed the definition of "refugee" in United States immigration law to that in the 1967 Protocol. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. at 436, 437; S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980).

The 1946 Constitution of the IRO, the 1951 United Nations Convention, and the 1967 United Nations Protocol all require that persecution be "for reasons of," "based on," or "because of" the victim's race, beliefs, or nationality. The drafters of these instruments had in mind the many victims of fascist racial and ideological persecution. Refugees, as defined by

the examples in these instruments, were not just the unwilling conscripts of the respective national combatants, or the victims of war's dislocation; they were instead those who were made to suffer for their race, their beliefs, or their nationality.

c. Even if it were fair ground for debate whether harm inflicted or threatened in order to achieve a political objective qualifies as "persecution on account of * * * political opinion"—and we think it is not—the Ninth Circuit should have limited its consideration to the question whether the BIA's interpretation of that phrase was based on a permissible construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-843. As the Eleventh Circuit explained in *Perlera-Escobar*, "[t]he meaning and scope of the phrase 'on account of . . . political opinion' is not defined by the Act, nor does it appear from the legislative history that Congress unambiguously expressed an intent that the term should be construed in a particular way." 894 F.2d at 1296. In that situation, the Ninth Circuit plainly erred in giving no weight to the BIA's determination—developed in several cases, see *id.* at 1297; App., *infra*, 32a-33a—that forcible conscription by a guerrilla group is not necessarily "persecution on account of * * * [the conscript's] political opinion." See 894 F.2d at 1296.[11] By itself filling any gap left by Congress in the Refugee Act, the Ninth Circuit arrogated to itself the authority to make immigration policy and usurped

[11] Judge Sneed, in describing the Ninth Circuit's "departure from the general rule of deference to administrative decisions," *Mendoza Perez* v. *INS*, 902 F.2d 760, 766 (1990) (concurring specially), quoted *Perlera-Escobar* at length and concluded: "We of the Ninth Circuit do not speak in those tones," 902 F.2d at 767.

the role of the agency to which Congress delegated that responsibility. See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2676-2681 (1990); *Fort Stewart Schools* v. *FLRA*, 110 S. Ct. 2043, 2046 (1990); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990); *Massachusetts* v. *Morash*, 490 U.S. 107, 114-118 (1989); *INS* v. *Cardoza-Fonseca*, 480 U.S. at 448; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844.

3. The Ninth Circuit's holding would, in the words of the Eleventh Circuit in *Perlera-Escobar*, "entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum." 894 F.2d at 1299 n.5. Given the number of draft-age males in countries like Guatemala, and the "incentives for draft-age males to raise asylum claims," *M.A. A26851062* v. *INS*, 899 F.2d 304, 315 (4th Cir. 1990) (en banc), it is not unreasonable to expect a flood of such claims from those placed in deportation proceedings in the Ninth Circuit.[12]

4. The importance of this case has not been diminished by passage of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Section 302 of that Act, 104 Stat. 5030, authorizes the Attorney General to extend "temporary protected status" to aliens who are nationals of a country that he finds,

[12] The number of aliens in a position to claim such relief is undoubtedly large. Over 60,000 aliens applied for asylum in 1988, more than twice as many as applied in 1987. *1988 Y.B. INS* xxviii (Aug. 1989). The number of asylum applications from Guatemala alone increased more than ten-fold in one year. *Ibid.* Approximately 56% of asylum applications are filed in the Immigration and Naturalization Service's Western Region, which lies within the jurisdiction of the Ninth Circuit. See *id.* at 58.

inter alia, to be in a state of "ongoing armed conflict" such that deportation to that country would pose a "serious threat" to the personal safety of the affected aliens. Section 302(b)(1)(A), 104 Stat. 5031 (to be codified at 8 U.S.C. 1254(a). But that status depends on particular country designations that have not been made, see *INS* v. *Cardoza-Fonseca*, 480 U.S. at 426 n.3 (asylum application not rendered moot by immigration law that was "not self-executing" and the procedures for which were "not yet in place"); the protected status is, as its name implies, "temporary," see Section 302(b)(2)(B), 104 Stat. 5032 (initial period of designation is "not less than 6 months and not more than 18 months"); cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 100-101 (1983) (administrative moratorium on police choke-hold for indefinite period did not moot challenge to practice); and temporary protected status is not the equivalent of asylum, since the Attorney General may adjust the status of an alien granted asylum to that of lawful permanent resident after one year; see 8 U.S.C. 1159; *INS* v. *Cardoza-Fonseca*, 480 U.S. at 427 n.3.

The "temporary protected status" authorized by the 1990 Immigration Act bears on the interpretation of the 1980 Refugee Act in one respect only. By authorizing the temporary withholding of deportation that "would pose a serious threat to [the alien's] personal safety," Section 302(b)(1)(A), 104 Stat. 5031, the 1990 Act seeks an objective far broader than that of the Refugee Act: it seeks to provide a sanctuary—albeit a temporary one—from the dangers of living in a country divided by civil war.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

FEBRUARY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7507

INS No. A27-926-183

JAIRO JONATHAN ELIAS ZACARIAS, PETITIONER

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

ORDER AND AMENDED OPINION

Petition for Review of Three Orders
By the Board of Immigration Appeals

Argued and Submitted
March 13, 1990—Pasadena, California

Filed July 23, 1990
Amended December 19, 1990

Before: Betty B. Fletcher, Harry Pregerson and
Dorothy W. Nelson, Circuit Judges

Opinion by Judge Fletcher

ORDER

The opinion is amended by: (1) Inserting after the last paragraph on page 7725 of the Slip opinion, the following language:

The "reasonable possibility" standard derives from the Seventh Circuit's test for determining well-founded fear enunciated in *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984) ("Sometimes, however, the applicant's own testimony will be all that is available regarding past persecution or the reasonable possibility of persecution."). In *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), the Supreme Court noted that the "reasonable possibility" standard was a "moderate interpretation" of Section 208(a)'s well-founded fear requirement. Subsequent Ninth Circuit case law has consistently expressed the risk of persecution that must be demonstrated in order to fulfill the objective requirement of well-founded fear as a "reasonable possibility." *See, e.g., Mendoza Perez v. INS*, 902 F.2d 760, 763 (9th Cir. 1990) ("To qualify for political asylum, the alien must show that . . . persecution is a 'reasonable possibility.' "); *Ramirez Rivas v. INS*, 899 F.2d 864, 866 (9th Cir. 1990) ("To be objectively reasonable, there must be some reasonable possibility of persecution . . ., but persecution does not have to be more likely than not."); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042 (9th Cir. 1987) ("[S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985) ("The objective component is satisfied if persecution is, in fact, a 'reasonable possibility.' ").

To demonstrate a reasonable possibility of persecution under this circuit's law, an applicant must present " 'specific facts' through objective evidence to prove 'good reason' to fear future persecution." *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984)), *aff'd*, 480 U.S. 421 (1987). This evidentiary burden is met by presenting evidence that is either documentary in nature or, in its absence, testimony that is "credible, persuasive, and refers to '*specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution.' " *Id.*; *see also De Valle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990) ("The objective component requires a showing, by credible, direct and specific evidence in the record, of facts that would support a reasonable fear that the petitioner faces persecution."). Like the "reasonable possibility" standard, this evidentiary standard derives from the Seventh Circuit's test for determining well-founded fear enunciated in *Carvajal-Munoz v. INS*, 743 F.2d at 574. While the "reasonable possibility" standard defines the risk of persecution that satisfies the objective component of well-founded fear, the "credible, direct and specific evidence" standard mandates the type of evidence that must be proffered to establish it.

We note that while the two-pronged formulation of the well-founded fear test, requiring both a subjective component (fear) and an objective component (a reasonability [sic] possibility of persecution), is the proper test to be applied in this circuit, other formulations of the well-founded fear test may not be inconsistent with this formulation. Thus, in *Canas Cuadras*

v. INS, 910 F.2d 567 (9th Cir. 1990), this circuit upheld the use of the "reasonable person" test set forth by the Fifth Circuit in *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987), as applied by the BIA in that case, because the BIA's analysis conformed with this circuit's formulation. First, the BIA determined that the applicant's fear was "subjectively genuine." 910 F.2d at 571. Second, it determined that there was an objectively "valid reason for the fear," and, thus, a reasonable possibility of persecution[5]. *Id.*

and adding a new footnote 5 (renumbering subsequent footnotes):

> [5] The "reasonable person" standard for asylum conceivably could fall prey to to [sic] the pitfall of failing to consider the circumstances of the applicant for asylum, in favor of considering whether an abstract person, divorced from this context, would experience fear of persecution. Application of that test in this manner would clearly be inconsistent with this circuit's formulation. However, the "reasonable person" standard need not be construed in this manner. As the Second Circuit explained in *Carcamo Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986):
>
> > [I]n evaluating a claim based on the fear that would strike a "reasonable person", the board should be sensitive to the position into which the person is, hypothetically, being placed. What is relevant is the fear a reasonable person would have, keeping in mind the context of a reasonable person who is facing the possibility of persecution, perhaps including, a loss of freedom or even, in some cases, the loss of life.
>
> Applied in this manner, the "reasonable person" test is consistent with this circuit's formulation of the well-founded fear test.

(2) Deleting the word, "presumption," at Slip op. 7731, line 4, and inserting "inference" in its stead.

OPINION

FLETCHER, Circuit Judge:

Elias Zacarias petitions for review of the denial of his application for political asylum and withholding of deportation. We grant his petition for review in respect to his claim to eligibility for asylum.

PRIOR PROCEEDINGS

Elias fled Guatemala in March of 1987. When he entered the United States in July of 1987, the respondent immigration and Naturalization Service ("INS" or "Service") apprehended him. He conceded deportability and applied for asylum and withholding of deportation. After a hearing on December 14, 1987 (the "December hearing") before an Immigration Judge ("IJ"), his application was denied. He appealed to the Board of Immigration Appeals ("BIA" or "Board"). The Board summarily dismissed his appeal on procedural grounds. He then moved for reconsideration. The Board denied the motion. He then moved for reopening of his asylum and withholding of deportation claims in light of new evidence; the Board denied that motion also, but excused the prior procedural lapse and gave the merits of his appeal plenary consideration. He now petitions this court for review of all three of the Board's adverse rulings. Because the Board cured whatever mistake it might have made in summarily dismissing

the first appeal, we do not review the denial of the motion to reconsider.[1] We treat the Board's denial of the motion to reopen as both an affirmance of the IJ's ruling after the initial hearing and as a denial of the motion to reopen.[2] We hold that the petitioner established eligibility for asylum at his initial hearing, but that the new evidence did not require the reopening of his withholding of deportation claim.

DISCUSSION

We review, in effect, two records in this case. The first is the record that the petitioner made before the IJ at the December hearing. The second is that record supplemented by a letter from the petitioner's father, which was submitted for the first time as an exhibit accompanying his September 28, 1988 petition to the Board to reopen the proceedings.

A. The December Hearing

At the December hearing, Elias testified that one evening in January of 1987, two uniformed guerrillas, carrying machine guns and wearing handkerchiefs

[1] In its November 18, 1988 opinion denying the motion to reopen, the Board, in addition to addressing the sufficiency of the new evidence as a basis for reopening, explained for the first time why it found that the petitioner was not entitled to relief based on the evidence he presented at his hearing before the IJ. The petitioner had been denied review on the merits by the Board of the IJ's decision because the petitioner's lawyer had submitted the brief late, owing to erroneous information given by a clerk of the Immigration Court. In its decision denying the motion to reopen, the Board said that it would "look beyond" the procedural mix-up and review the IJ's decision on the merits.

[2] The INS in its brief suggested that we treat the Board's rulings in this manner.

to conceal their faces, approached the house where he and his parents lived. They identified themselves as guerrillas, and attempted to persuade him to join their ranks. Elias refused to join, despite their insistence. They told him to "think it [over] well" and said that they would be back. The petitioner, afraid that the guerrillas would come back and "take him," fled Guatemala approximately two months later.[3] He was eighteen at the time.

The record before the IJ at the hearing included, in addition to Elias' testimony, an advisory letter from the State Department regarding Elias' application. The letter said in relevant part:

> The applicant alleges fear of persecution because of civil conflict that afflicts parts of Guatemala and has caused various hardships and dangers, including forced recruitment by opposing armed forces. . . . Persons who flee their homelands due to national armed conflicts in which they are random victims of violence, intimidation, or recruitment are not generally classifiable as refugees under U.S. law.
>
> *This opinion is based on our analysis of country conditions and other relevant factors*, plus an evaluation of the specific information provided in the application.

Administrative Record at 86 (emphasis added).

The petitioner, of course, does not agree with the State Department's ultimate legal conclusion, but he asserts that the first sentence in the quotation constitutes a recognition by the State Department that both sides in Guatemala's civil war engage in forced

[3] The IJ found Elias' testimony to be credible and the BIA did not disturb that finding.

recruitment. The INS argues that the sentence merely restates the petitioner's allegations.

We review the Board's factual findings under the "substantial evidence" standard and reverse if the BIA's findings are not substantially reasonable. *Artiga Turcios v. INS*, 829 F.2d 720, 723 (9th Cir. 1987).

Both the face of the letter and the other evidence in the record convince us that the Service's interpretation of the letter is not supported by substantial evidence. The emphasized portion of the letter explicitly says that the State Department independently analyzed country conditions. Moreover, the State Department, in saying that "opposing armed forces" engage in forced recruitment, could not have been merely restating the petitioner's allegations, because nothing in the portion of the petitioner's asylum application reviewed by the State Department alleged forced recruitment by either side in the civil war, let alone *both* sides. When read in the context of the record as a whole, the letter supports the petitioner's claim that the guerrillas engage in forced recruitment.[4]

---

[4] The petitioner also calls our attention to another document written by the State Department, a report by the Department to both houses of Congress in February, 1990, saying, *inter alia*,

> [T]he Communist guerrillas increased their campaign of violence which included destruction of public and private property, robbery, *forced recruitment* and labor, and indiscriminate use of land mines.

Department of State, 101st Cong., 2d Sess., *Country Reports on Human Rights Practices for 1989* (Joint Comm. Print 1990) (emphasis added).

We do not use the Report to support our conclusion that the BIA misread the State Department's letter. The BIA's decision was rendered before the Report was issued.

We now consider whether Elias' encounter with the guerrillas, coupled with the fact that the guerrillas engage in forced recruitment, entitles him to eligibility for asylum or withholding of deportation.

To obtain withholding of deportation, a person must show that, if deported to his home country, it is more likely than not that his life or freedom would be threatened on account of race, religion, nationality, membership in particular social group, or political opinion. Immigration and Nationality Act (INA) § 243(h), 8 U.S.C. § 1253(h); *INS v. Stevic*, 467 U.S. 407 (1984). To establish eligibility for asylum, an applicant must show that he has a well-founded fear of persecution on account of at least one of those same five bases. INA § 208(a), 8 U.S.C. § 1158(a); INA § 101(a)(42)(a), 8 U.S.C. § 1101(a)(42)(A). A "well-founded fear" is a fear that is both genuine and objectively reasonable. To be objectively reasonable, there must be some reasonable possibility of persecution, but persecution does not have to be more likely than not. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987).

The "reasonable possibility" standard derives from the Seventh Circuit's test for determining well-founded fear enunciated in *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984) ("Sometimes, however, the applicant's own testimony will be all that is available regarding past persecution or the reasonable possibility of persecution."). In *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), the Supreme Court noted that the "reasonable possibility" standard was a "moderate interpretation" of Section 208(a)'s well-founded fear requirement. Subsequent Ninth Circuit case law has consistently expressed the risk of persecution that must be demonstrated in order to fulfill the objective requirement of well-founded

fear as a "reasonable possibility." *See, e.g., Mendoza Perez v. INS*, 902 F.2d 760, 763 (9th Cir. 1990) ("To qualify for political asylum, the alien must show that . . . persecution is a 'reasonable possibility.' "); *Ramirez Rivas v. INS*, 899 F.2d 864, 866 (9th Cir. 1990) ("To be objectively reasonable, there must be some reasonable possibility of persecution . . ., but persecution does not have to be more likely than not."); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042 (9th Cir. 1987) ("[S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985) ("The objective component is satisfied if persecution is, in fact, a 'reasonable possibility.' ").

To demonstrate a reasonable possibility of persecution under this circuit's law, an applicant must present " 'specific facts' through objective evidence to prove 'good reason' to fear future persecution." *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984)), *aff'd*, 480 U.S. 421 (1987). This evidentiary burden is met by presenting evidence that is either documentary in nature or, in its absence, testimony that is "credible, persuasive, and refers to '*specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution.' " *Id.*; *see also De Valle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990) ("The objective component requires a showing, by credible, direct and specific evidence in the record, of facts that would support a reasonable fear that the petitioner faces persecution."). Like the "reasonable possibility" standard, this evidentiary standard derives from the Seventh Circuit's test for determining well-founded fear enunciated in *Carvajal-Munoz v. INS*, 743 F.2d at 574. While the "reasonable possibility" standard defines the risk of persecution that satisfies the objective component of well-founded fear, the "credible, direct and specific evidence" standard mandates the type of evidence that must be proffered to establish it.

We note that while the two-pronged formulation of the well-founded fear test, requiring both a subjective component (fear) and an objective component (a reasonability [sic] possibility of persecution), is the proper test to be applied in this circuit, other formulations of the well-founded fear test may not be inconsistent with this formulation. Thus, in *Canas Cuadras v. INS*, 910 F.2d 567 (9th Cir. 1990), this circuit upheld the use of the "reasonable person" test set forth by the Fifth Circuit in *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987), as applied by the BIA in that case, because the BIA's analysis conformed with this circuit's formulation. First, the BIA determined that the applicant's fear was "subjectively genuine." 910 F.2d at 571. Second, it determined that there was an objectively "valid reason for the fear," and, thus, a reasonable possibility of persecution[5]. *Id.*

---

[5] The "reasonable person" standard for asylum conceivably could fall prey to the pitfall of failing to consider the circumstances of the applicant for asylum, in favor of considering whether an abstract person, divorced from this context, would experience fear of persecution. Application of that test in this manner would clearly be inconsistent with this circuit's formulation. However, the "reasonable person" standard need not be construed in this manner. As the Second

The persecution need not come from the government in order for the alien to obtain relief; it can come from an entity which the government is "unwilling or unable to control." *McMullen v. INS*, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981). Because nongovernmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution.[6] *Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988); *see also Artiga Turcios*, 829 F.2d at 723. The persecution is properly categorized as "on account of political opinion," because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political. *Arteaga*, 836 F.2d at 1232 n.8; *see also Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984) ("Because [alien] refused to join [guerrillas'] cause, the guerrillas are likely to consider him a political opponent").

Circuit explained in *Carcamo Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986):

> [I]n evaluating a claim based on the fear that would strike a "reasonable person", the board should be sensitive to the position into which the person is, hypothetically, being placed. What is relevant is the fear a reasonable person would have, keeping in mind the context of a reasonable person who is facing the possibility of persecution, perhaps including a loss of freedom or even, in some cases, the loss of life.

Applied in this manner, the "reasonable person" test is consistent with this circuit's formulation of the well-founded fear test.

[6] The State Department in its advisory letter failed to recognize this, hence its legal error.

An alien need not actually have suffered persecution in order to qualify for withholding of deportation or asylum. A threat of persecution can be enough. Indeed, with regard to withholding of deportation, the statute expressly speaks in terms of the *threat* to the alien's life or freedom. INA § 243(h). The threat can be an explicit verbal threat or a threat that is implicit from the circumstances. *Artiga Turcios*, 829 F.2d at 723. The key question is whether "there is reason to take the threat seriously." *Bolanos-Hernandez*, 767 F.2d at 1285. If it is "more likely than not" that the threat will be carried out, the petitioner is entitled to withholding of deportation. If there is a "reasonable possibility" that it will be carried out, the petitioner is eligible for asylum. In determining the likelihood that the alien will be persecuted, "we examine the guerrillas' will or ability to carry out the threat, not simply whether threats were made." *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988); *Arteaga*, 832 F.2d at 1232-33.

In *Rodriguez-Rivera*, the court faced a peculiar factual situation. The applicant, Rodriguez-Rivera, knew and worked with Salvador, the person chiefly responsible for the threats against him. 848 F.2d at 1000. Salvador died shortly after Rodriguez-Rivera fled the country. Salvador was a guerrilla, but, according to Rodriguez-Rivera's testimony, he threatened only that "'he' (Salvador) would kill Rodriguez-Rivera." *Id.* at 1006. Salvador did not state or imply that *the guerrillas* would kill Rodriguez-Rivera, that they had any interest in him, or that they even knew who he was or where he lived; Salvador stated only that *he* personally wanted to kill Rodriguez-Rivera. Thus, the BIA in that case reasonably could conclude that

when Salvador died, the threat he personally presented died with him. Indeed, the court stated that "the fact that Salvador is now dead is the most significant factor supporting the BIA's determination." *Id.* Obviously, the testimony countering the ordinary inference that Salvador, as a guerrilla, was threatening Rodriguez-Rivera in order to carry out the goals of the guerrillas (as opposed to his own personal goals) was crucial to the outcome of that case. If the guerrillas had been aware of Rodriguez-Rivera's availability as a potential recruit, they could easily have assigned someone other than Salvador to do the dirty work, and the threat would have continued to be serious.

With regard to the two men who accompanied Salvador when he made a second threat against Rodriguez-Rivera, there was absolutely no evidence in the record suggesting that those men knew who Rodriguez-Rivera was or where he lived. In light of the statements made by Salvador while he and the two men were threatening Rodriguez-Rivera, it was not unreasonable to infer that the men's only interest in Rodriguez-Rivera was to assist Salvador in his personal vendetta. Neither the men's words, their conduct, nor the circumstances surrounding their encounter with Rodriguez-Rivera suggested that the guerrillas as a group had an interest in killing, kidnapping, or otherwise persecuting Rodriguez-Rivera. The BIA could thus reasonably conclude[7] that when Salvador died, the two men did not have the *ability*

[7] The asylum applicant in *Rodriguez-Rivera* did not mention in his application the two most significant threats that he testified to in his hearing. *Rodriguez-Rivera*, 848 F.2d at 1000. That cast some doubt on his credibility and affected the court's review.

to persecute Rodriguez-Rivera, because they did not know who he was or where he lived, and that they did not have the *will* to persecute him, because their only reason to bother him was to assist Salvador, who had died.

In *Arteaga*, the alien was confronted at his house by a group of guerrillas who tried to induce him to join their cause. After he refused, they said to him: "Even if you don't come, we'll get you." *Arteaga*, 836 F.2d at 1228. In *Arteaga*, unlike in *Rodriguez-Rivera*, there was no evidence contradicting the common sense inference that the threat was from the guerrillas as a group and not just from the particular individuals assembled at his house.

The court stated in *Arteaga* that "a specific verbal threat by the guerrillas directed at an individual whose identity and residence are known to the guerrillas is sufficient to create a well-founded fear." 836 F.2d at 1233. In *Rodriguez-Rivera*, 848 F.2d at 1006, the court observed that this statement in *Arteaga* had to be qualified by the holding in *Bolanos-Hernandez*, 767 F.2d at 1285-86, that the group making the threat had to have the "will or ability" to carry it out. This observation was unremarkable because the *Arteaga* court itself qualified the statement in the same way. *Arteaga*, 836 F.2d at 1232 (citing *Bolanos-Hernandez*).

After making its observation, the *Rodriguez-Rivera* court then said that "the entire discussion of the eligibility for asylum in *Arteaga* was dicta[.]" *Rodriguez-Rivera*, 848 F.2d at 1006. The *Rodriguez-Rivera* court did not say that *Arteaga*'s analysis of asylum was *incorrect*. To the extent that *Rodriguez-Rivera* implied *Arteaga* was incorrect, that implication would itself be dicta, for nothing in *Rodriguez-*

Rivera's holding was inconsistent with *Arteaga*'s discussion of eligibility for asylum. In any event, the reasoning in the two cases can be reconciled; both *Arteaga* and *Rodriguez-Rivera* followed *Bolanos-Hernandez*.

Rodriguez-Rivera, *Arteaga*, and *Bolanos-Hernandez* together stand for the proposition that when a member of a group which engages in violence makes a threat, and there is no evidence that the member has only personal motives for making the threat, the reasonable inference is that the *group* is responsible for the threat and that the will or ability of the *group* should be examined to determine if it is reasonable to take the threat seriously.

Examining the facts in light of these authorities, we conclude that Elias established eligibility for asylum at the December hearing but that he did not establish entitlement to withholding of deportation. There is no dispute that Elias' fear of persecution was genuine and that he thus satisfied the subjective test for eligibility for asylum. He testified credibly that he feared the guerrillas would return and "take" him against his will. The dispute is over whether he satisfied the objective test and showed there was a reasonable possibility that the guerrillas would forcibly recruit him.

The Board's crucial error was its conclusion that the Guatemalan guerrillas do not engage in forced recruitment. For the reasons stated above, the State Department letter was proof that the guerrillas do engage in forced recruitment. The Board's error colored its analysis of the circumstances surrounding the guerrillas' encounter with Elias. After the guerrillas failed in their attempt to persuade Elias to join voluntarily, they told him to "think it [over] well"

and that they would be back. Because the Board believed that the guerrillas did not engage in forced recruitment, it did not think it reasonable for Elias to interpret the guerrillas' statements to constitute a threat of persecution. But in light of the guerrillas' practice of using force to recruit people, it certainly was reasonable for a person in Elias' situation to take the statements as threats. *See Artiga Turcios*, 829 F.2d at 723-24 (focus is on whether it was reasonable for the alien to perceive the circumstances as threatening). Moreover, the men who attempted to recruit him carried machine guns and wore masks, lending further credence to Elias' belief that he was being threatened.[8]

We now consider whether the guerrillas had the will and ability to persecute Elias. The fact that the guerrillas engaged in forced recruitment is proof that they had the will to persecute Elias. That Elias was not harmed in the two-month period during which he was preparing to leave the country is relevant, but as we said in *Rivas v. INS*, No. 88-7433, slip op. 3157, 3173-74 (9th Cir. March 29, 1990), the fact that some time passed without harm has only marginal probative value. *Rivas* and the cases it

---

[8] The BIA thought it significant that the guerrillas did not actually point the weapons at Elias. Has they done that, we might have a case of actual persecution rather than a case of threatened persecution. *Cf. Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ("evidence of past persecution or a threat of future persecution" can establish well-founded fear).

At oral argument the lawyer for the INS indulged in the wholly unwarranted speculation that the guerrillas wore handkerchiefs not to conceal their faces but "because it might have been dusty that day."

cited as support for that proposition found that the alien had established a clear probability of persecution despite short periods without harm. In addition to having the will to persecute Elias, the guerrillas had the ability to persecute him because they knew where he lived and who he was.

Finally, the threat to Elias was for political as opposed to personal reasons; the Board did not suggest that the individual guerrillas who appeared at his door had a personal quarrel with Elias, and in any event, there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting Elias to further the *group*'s political goals. There was thus a reasonable possibility, based on the evidence presented at the December hearing, that the guerrillas would return and take Elias by force, thereby persecuting him on account of political opinion. The Board's conclusion that Elias was ineligible for asylum was not substantially reasonable. *See Artiga Turcios.*

The Board, however, was substantially reasonable in concluding that Elias failed to prove the "clear probability" of persecution necessary to obtain withholding of deportation. Elias did not present evidence suggesting that forced recruitment by the Guatemalan guerrillas occurred with such frequency that it would be more likely than not that Elias would be forcibly recruited.[9] Nor did he present evidence

[9] In many of our cases concerning threats by the Salvadoran guerrillas, this issue apparently was not even in dispute, perhaps because the practices of the Salvadoran guerrillas are well-documented. *See e.g., Artiga Turcios; Maldonado-Cruz,* 883 F.2d at 791-92 ("Maldonado 'is likely to be persecuted by a politically motivated group that frequently engages in terrorist tactics directed at those who refuse to join its armed political struggle.' ") (quoting *Bolanos-Hernandez,* 767 F.2d at 1287).

that members of his family or other persons whom he knew were the victims of forced recruitment. *Cf. Bolanos-Hernandez,* 767 F.2d at 1280 (petitioner's friends had been killed after receiving threats by Salvadoran guerrillas; entitlement to withholding of deportation established). Either kind of evidence would have strengthened his case. Nonetheless, the fact that the Guatemalan guerrillas use forced recruitment with sufficient frequency for the State Department to have taken notice and that they had once approached Elias masked and armed and had promised to return, demonstrates that there was a reasonable possibility that the guerrillas would return and take Elias.[10]

B. The Motion to Reopen

About ten months after the December Hearing, Elias' father wrote him a letter saying that guerrillas had returned to the house two times after Elias had fled (and after the time of the hearing) and that they had asked for Elias and his father both times. The first time, only Elias' mother was home; she told them her son and her husband were out, and she refused to be more specific. They left. The second time, three months later, Elias' father was home. They attempted to recruit the father, but according to the letter, they were more interested in Elias, since the father was 60 years old. He told them that Elias had fled to the United States.

Elias, in his motion to reopen, argued to the Board that this new evidence in conjunction with the evi-

[10] We do not imply that information regarding conditions and practices in a country must come from a government agency such as the State Department. Evidence from other sources also can be highly probative.

dence presented at the December Hearing established a prima facie case of entitlement to withholding of deportation and of eligibility for asylum. Since we have held that Elias established his eligibility for asylum without the additional evidence, we consider only whether a prima facie case has been established for withholding of deportation.

As a threshold matter, we address the standard of review for petitions to review motions to reopen.

In *INS v. Abudu*, 108 S.Ct. at 911-12, the Supreme Court noted that the BIA can deny a motion to reopen on any of three independent grounds:

> First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. *The standard of review of such a denial is not before us today*[.] Second the BIA may hold that the movant has not introduced previously unavailable, material evidence, 8 CFR § 3.2 (1987), or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum [11] initially, 8 CFR § 208.11 (1987). . . . We decide today that the appropriate standard of review of such denials is abuse of discretion. Third, in cases in which the ultimate grant of relief is discretionary (asylum . . . but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to

[11] The Board treats asylum aplications also as applications for withholding of deportation, 8 C.F.R. § 208.3(b) (1987), so this ground applies to withholding claims as well.

> the discretionary grant of relief. We have consistently held that denials on this third ground are subject to an abuse-of-discretion standard.

(Emphasis added). In *INS v. Abudu*, the Supreme Court reversed our decision in *Abudu v. INS* because we read the BIA's opinion in that case to constitute a denial only on the first ground, when in fact the BIA also denied the alien's claim on the second ground, because he did not adequately explain why he had failed to apply for asylum at his initial hearing.

The Supreme Court made it clear throughout its opinion that it was addressing only the standard of review for denials of motions to reopen based on questions such as: whether the evidence was available at the time of the original deportation hearing; if it was available, whether the moving party had a reasonable excuse for failing to adduce it; if it was not available, whether there was other significant evidence at the time of the hearing such that the moving party should have pressed claims based on that evidence and not delayed. These questions all help to ferret out cases where parties present new evidence principally for the purpose of causing delay. The Supreme Court in *INS v. Abudu*, 108 S.Ct. at 914, reasoned that any tribunal, administrative or otherwise, ought to have broad discretion to deter such abuses.

That reasoning does not apply with the same force when the tribunal has found that the movant's failure to adduce the evidence was most likely not attributable to a desire for delay and when the tribunal has chosen to address the merits. Indeed, when the substantive issue being litigated is the probability of *future* events occurring, as it frequently is in asylum

and withholding cases, there are particularly compelling reasons for allowing the merits of the alien's claim to be given a hearing in light of evidence of new developments. Those new developments can substitute for the speculation on which the initial judgment was based.

In any event, the Supreme Court explicitly stated in *INS v. Abudu* that it was not addressing the standard of review for denials of motions to reopen based on the failure to establish a prima facie case. Our discussion in *Abudu v. INS* of the appropriate standard of review for denials of reopening based on the alien's failure to make a prima facie case of eligibility for asylum [12] or withholding of deportation therefore still stands.

In *Abudu v. INS*, we held that the standard of review is "abuse of discretion." 802 F.2d at 1100. More specifically, we held that "the Board must accept the factual statements in the alien's affidavits as true," *id.* at 1101, and that the Board abuses its discretion if it fails to find a prima facie case established when the evidence in the affidavits satisfies the requirements for eligibility for substantial relief. *Id.* at 1100. We had so held in a number of previous cases. In *Aviles-Torres v. INS*, 790 F.2d 1433, 1436 (9th Cir. 1986), for example, we held that "[t]he Board must accept the factual statements in the alien's affidavits as true unless they are inherently unbelievable" and that "[t]he Board has no discretion if the alien proves his [prima facie] claim." In

[12] The determination of whether an alien is *eligible* for asylum as a "refugee" within the meaning of INA § 102(a)(42)(A), as opposed to whether he is entitled to the ultimate *grant* of asylum, is not within the BIA's discretion. *See Hernandez-Ortiz v. INS*, 777 F.2d 509, 518 (9th Cir. 1985).

Sakhavat v. INS, 796 F.2d 1201 (9th Cir. 1986), we held that "the BIA abused its discretion when it disbelieved affidavit evidence that was not inherently incredible," and found that the BIA erred "by either ignoring or prematurely discrediting key elements of Sakhavat's prima facie case." *Id.* at 1204-05 (citations and internal quotations omitted); *see also Ghadessi v. INS*, 797 F.2d 804, 806-07 (9th Cir. 1986) (faulting Board for its "weighing of the quality, rather than the sufficiency" of evidence in a motion to reopen). In *Abudu v. INS*, 802 F.2d at 1101, we extended the reasoning of these cases and held that on a motion to reopen, the Board "must draw reasonable inferences from the facts [pertaining to the merits of the prima facie case] in favor of" the moving party. The evidence in *Abudu v. INS* came exclusively from affidavits. In a case where some of the evidence is developed at a hearing, the BIA is of course free to interpret that evidence free from inferences in favor of the moving party. The BIA's conclusions derived from that evidence will be accepted by the reviewing court if it is supported by substantial evidence. *See Artiga Turcios*, 829 F.2d at 723.

In the case under consideration, the Board denied the motion to reopen because of Elias' failure to furnish sufficient additional evidence, when taken together with the evidence adduced at the hearing before the IJ to make out a prima facie case, the first ground identified by the Court in *INS v. Abudu*.[13]

[13] The INS seems to suggest in one cryptic sentence in its brief that the BIA denied the motion to reopen not only because the new evidence, combined with the old, did not establish a prima facie case, but because the new evidence was not "material" within the meaning of 8 C.F.R. § 3.2. The Board mentioned the materiality requirement, but to the

We therefore apply the standard of review from our decision in *Abudu v. INS*.

The BIA accepted the father's letter as true, but it denied the claim of eligibility for asylum (and *a fortiori* the claim for withholding of deportation) because it believed there was no new evidence that the guerrillas engaged in forced recruitment. We disagreed with the Board's assessment of the initial evidence, because, as we stated above, it was error to find that the guerrillas do not engage in forced recruitment; however, we agree with the Board's assessment of the evidence on the motion to reopen. The petitioner's new evidence may have strengthened

---

extent the Board applied it, it did so in such a way as to equate "material evidence" with evidence sufficient to make out a prima facie case. The Supreme Court in *INS v. Abudu* stated that the BIA has broad discretion to deny motions based on new evidence that is not material, 108 S.Ct. at 909 n.3. To read "material" the way the Board apparently did in this case would be to render meaningless the Supreme Court's careful distinction in *INS v. Abudu* between denials based on materiality and denials based on failure to establish a prima facie case. By "material" evidence, the Supreme Court could only have meant evidence tending to strengthen the alien's claim for relief, not evidence so probative that it would establish a prima facie case for relief.

The Board's confusion is evidenced by the fact that it based its definition of materiality on a misquotation from the Supreme Court's decision in *INS v. Abudu*. The BIA quoted *INS v. Abudu* to say at page 914: " 'Material evidence,' in the context of a motion to reopen, is evidence the facts of which 'are of such a nature that they will probably change the results if [a new hearing is held].' " We cannot find the words quoted or anything resembling them at the page cited, or indeed anywhere in the Supreme Court's opinion. Wherever this quotation comes from, it sounds more like the definition of new evidence sufficient to make a prima facie case on reopening than it does the definition of "material."

his claim to eligibility for asylum [14] but it did not cure the key deficiency in his withholding of deportation claim. To show that forced recruitment was more than a reasonable possibility, Elias needed to present more specific evidence concerning the extent of forced recruitment by the guerrillas, either in the country at large or as it affected him, members of his family or other people whom he knew. *Cf. Bolanos-Hernandez*, 767 F.2d at 1280.

CONCLUSION

Elias established his eligibility for asylum; he did not establish his entitlement to withholding of deportation. To that extent, the petition for review is granted. We remand to the Board to exercise its discretion with respect to the petitioner's asylum application.

---

[14] The *only* reason given by the Immigration Judge for denying Elias' asylum application at the December hearing was that Elias did not present evidence that the guerrillas had returned before he fled. That they apparently did return illustrates why we generally do not think it is reasonable for the Board to accord significant weight to short periods where no incidents occur.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7507

INS No. A27-926-183

JAIRO JONATHAN ELIAS ZACARIAS, PETITIONER

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

ORDER

[Filed Jan. 10, 1991]

Before: FLETCHER, PREGERSON and NELSON,
Circuit Judges

Except to the extent reflected in the amended opinion filed December 19, 1990, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF
IMMIGRATION REVIEW

File: A27 926 183—Phoenix Date: Nov. 18, 1988

In re: JAIRO JONATHAN *ELIAS*-ZACARIAS

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:

Susan Giersbach-Rascon, Esquire
Arizona Center for Immigration
214 East Willetta
Phoenix, Arizona 35004

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251 (a)(2)]—Entered without inspection

APPLICATION: Reopening

DECISION OF THE BOARD OF IMMIGRATION APPEALS

ORDER:

PER CURIAM. The respondent, through counsel, has filed a Motion to Reopen requesting this Board to reopen his deportation hearing in order to allow new evidence to be submitted in support of this appeal. The motion will be denied.

On July 15, 1988, the Board summarily dismissed the respondent's appeal, pursuant to 8 C.F.R. § 3.1 (d)(1-a)(i), for filing a Notice of Appeal (Form

I-290A) based only on generalized statements that failed to adequately specify the reasons for the appeal. However, the Board granted the respondent an additional 30 days in which to voluntarily depart the United States. The Board subsequently received from the respondent a Motion to Reconsider our decision. On September 12, 1988, we denied this motion on the grounds that respondent's motion was actually a Motion to Reopen, and that no new evidence or affidavits supporting this motion had been submitted pursuant to the requirements of 8 C.F.R. §§ 3.2 and 103.5. On September 28, 1988, the Board received from the respondent a Motion to Reopen. Attached to the motion is a letter from the respondent's father, received by the respondent, in early August 1988, an affidavit by counsel attesting to the fact that she had an informal agreement with the clerk of the immigration court resetting the respondent's due date for filing an appellate brief or statement in support of the appeal, and an affidavit from another attorney in counsel's office also attesting to this informal arrangement with the immigration court.

First, concerning the belatedness of the respondent's supporting brief on appeal, the Board once again reiterates that the Board may only act on evidence submitted in the record. Even though counsel has submitted two affidavits in support of her contention that the only reason a brief wasn't timely filed in this case was due to a misunderstanding with the immigration court clerk, the form of these assertions are not important. As the respondent is a licensed attorney and an officer of the court, we do not doubt the validity of her statements. In our previous decision, we looked beyond this issue and

dismissed the respondent's motion based on his failure to meet the statutory requirements in support of that motion. In this case, we will do the same. However, it is obvious that "informal" arrangements between the immigration court and aliens or their counsel, have the potential for creating unforeseen problems, particularly when these arrangements conflict with the evidence of record. Such is the case now before us. Had counsel submitted a separate brief or statement in accordance with the attached briefing schedule, then last minute motions, which require a heavy burden on which to prevail, would be unnecessary. With that said, we will turn now to the merits of the respondent's Motion to Reopen.

Federal regulations at 8 C.F.R. §§ 3.2 and 103.5 mandate that a motion to reopen shall not be granted unless the evidence was not available and could not have been discovered or presented at the former hearing, and that it shall be supported by affidavits or other evidentiary material. *See, e.g., INS* v. *Wang*, 450 U.S. 139, 141 (1981); *Acevedo* v. *INS*, 538 F.2d 918, 920 (2d Cir. 1976). Further, the new facts alleged must be sufficient, if proved, to change the result of the previous decision. That is, a *prima facie* showing must be made that shows statutory eligibility and that the respondent warrants the relief as a matter of discretion. *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979). The decision to grant or deny a motion to reopen is within the sound discretion of the Board. 8 C.F.R. § 3.8; *Matter of Barocio*, Interim Decision 2992 (BIA 1985).

Most recently, in *INS* v. *Abudu*, —— U.S. ——, 108 S. Ct. 904 (1988), the Supreme Court addressed the issue of the standard of review that must be applied to such motions in order to file an application

for asylum for the first time. The Court opined that motions to reopen in the administrative context are analogous to motions for a new trial in a criminal case on the basis of newly discovered evidence, and where the moving party bears a heavy burden before prevailing. In both contexts, the Court stated that there is a strong public interest in bringing litigation to a close as promptly as is consistent with a fair hearing and adjudication of facts, and that all ambiguities in the factual averments must be resolved in a movant's favor. The Court went on to recognize the special administrative, judicial, and sometimes political, considerations in the immigration law context, and where giving deference to decisions on petitions for reopening or reconsideration apply with even greater force. *Abudu* at 914-15.

Even if we take as true the supporting documents in respondent's motion, we nonetheless find that he has failed to sustain his heavy burden in this motion. Whether addressed in terms of "material" evidence [1] as required by 8 C.F.R. § 3.2, or a "prima facie" showing of eligibility, the respondent's factual basis will not support reopening these proceedings.

Both in his written application for asylum (Form I-589), and his testimony at trial, the respondent stated that he fled his native country of Guatemala approximately 2 months after a small group of guerrillas visited his home one night in January 1987,

---

[1] "Material evidence," in the context of a motion to reopen, is evidence the facts of which "are of such a nature that they will probably change the results if [a new hearing is held]." It is evidence "which, by itself or in conjunction with other evidence of record, is determinative of an issue." *Abudu, supra* at 914, *citing Taylor* v. *Illinois*, 484 U.S. ——, —— n.18, 108 S. Ct. 646, 655, n.18, 98 L. Ed. 2d 798 (1988) (citing cases).

where they attempted to persuade him to join them. When the respondent refused, the guerrillas left the respondent unharmed, but told him to think it over and that they would return at a later date. Based on this evidence, the immigration judge at respondent's deportation hearing found that since the guerrillas never returned, and the respondent's family never subsequently had any problems from the guerrillas, the respondent had failed to show that the guerrillas would seek him out upon his return.

In his Motion to Reopen, the respondent attached a recently received letter from his father indicating that the guerrillas twice returned to the home where the respondent had lived with his parents, searching for the respondent. This, argues the respondent, clearly shows that the immigration judge was incorrect in finding that the guerrillas would not keep searching for him, and corroborates the respondent's assertion that he has a well-founded fear of persecution by the guerrillas who would impute to him a political opinion for his refusal to serve with them. Indeed, the letter from respondent's father indicates that the guerrillas visited their home in January of 1988, and asked for him (the father) and his wife, but left when they discovered he was not at home. The second visit occurred in April 1988, when the guerrillas asked for the respondent, but was told that he was in the United States. Again, these visits were for the purpose of attempting to recruit the respondent, as counsel alleges in her motion.

Based on this evidence, we find that the respondent not only has failed to sustain his burden for reopening, as stated above, but also has failed to produce evidence that would establish a well-founded fear of persecution under the Act. Although the respondent has cited certain Ninth Circuit decisions

in support of his contention that he would be persecuted upon his return, we do not find these applicable to respondent's claim. Even though the respondent alleges that he was threatened by the guerrillas, the evidence of record does not bear this out. In fact, when the guerrillas left, they told the respondent that they would return. However, there was no threat made to the respondent that he would be harmed if he refused to join them. Further, the respondent admitted that he did not join the guerrillas because he would be sought after by the government, and also because the guerrillas often killed those who joined them and then deserted. Since the respondent refused to join the guerrillas, any fear he may have of being harmed by them is only speculative, particularly where no evidence has been submitted to show that the guerrillas harm those who refuse their invitation to join them, and that this harm would amount to persecution rather than retribution.

Moreover, in our decisions in *Matter of Vigil*, Interim Decision 3050 (BIA 1988), and *Matter of Maldonado*, Interim Decision 3041 (BIA 1988), we opined that when a guerrilla organization attempted to recruit someone, the initial encounter was important to examine in order to determine the motivations of the guerrillas. In this case, the guerrillas wanted the respondent to join them, and according to respondent's father, even offered to pay the respondent for his services. In respondent's brief in support of his latest motion, he acknowledges that the subsequent visits by the guerrillas were also an attempt to recruit him in order for him to assist the guerrillas in their attempt to violently overthrow the Guatemalan Government. It can hardly be said that the guerrillas, in any of their visits, sought to harm

the respondent for having opinions they found offensive. Finally, we do not find the facts of this case to be controlled by the recent Ninth Circuit decision in *Arteaga* v. *INS*, 836 F.2d 1227 (9th Cir. 1988), where the alien there was actually threatened by the guerrillas for his refusal to join them. In the case now before us, the respondent has not shown that any threats were directed towards him by the guerrillas, only that he was approached by them and asked to join. In any event, the subsequent Ninth Circuit decision in *Rodriguez-Rivera* v. *INS*, —— F.2d ——, No. 87-7140 (9th Cir. 1988), indicates that the entire discussion in *Arteaga* regarding asylum eligibility, was *dicta*.

Accordingly, as we find that the respondent has failed to show, by his new evidence, a *prima facie* eligibility for asylum or that the results of respondent's deportation hearing would be changed due to the information contained in the letter, we must deny the respondent's Motion to Reopen. Accordingly, the Motion to Reopen is denied.

/s/ Mary Maguire Dunne
For the Board

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

File: A27 926 183—Phoenix Date: Sep. 12, 1988

In re: JAIRO JONATHAN *ELIAS*-ZACARIAS

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Susan Giersbach-Rascon, Esquire
214 East Willetta
Phoenix, Arizona 85025

ON BEHALF OF SERVICE:

Linda Boone
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251 (a)(2)]—Entered without inspection

APPLICATION: Reconsideration

DECISION OF THE BOARD OF IMMIGRATION APPEALS

ORDER:

PER CURIAM. The respondent, through his counsel, has filed a Motion to Reconsider requesting this Board to reconsider the prior decision, and to allow him to file a brief in support of his appeal. The motion will be denied.

In a July 15, 1988, decision, the Board summarily dismissed the respondent's appeal for filing a Notice of Appeal (Form I-290A) based on only generalized statements that failed to adequately specify the reasons for the appeal, pursuant to 8 C.F.R. § 3.1(d)(1-a)(i). We also noted there that, although counsel had indicated on the appeal form that she would be filing a separate brief or statement, no brief or statement was provided within the briefing schedule after she received a verbatim transcript of the proceedings.

In a Motion to Reconsider, counsel for the respondent alleges that she had an oral understanding with a clerk of the immigration court that a new briefing schedule would be reset. Relying upon this oral representation, counsel avers that she did not file a brief or statement as she was waiting for the new briefing schedule to be forwarded to her.

Even though counsel has termed this a Motion to Reconsider, we believe, based on the circumstances, that this should more appropriately be a Motion to Reopen. In any event, we see no adequate basis upon which to grant the respondent's motion. First, there has been submitted no new evidence or affidavits supporting this motion, as required by 8 C.F.R. §§ 3.2 and 103.5. Second, as far as the record is concerned, counsel was granted until May 26, 1988, to submit an additional brief or statement in support of the Notice of Appeal, but failed to do so. Although counsel indicated that it is a common practice between the immigration court clerk and counsel's office to "informally" reset briefing schedules, the Board is bound by the evidence contained in the record, and must act solely thereon. Third, although counsel asserts that the respondent's appeal is meritorious,

counsel has not provided any evidence to corroborate such an assertion.

In short, we do not find that the reasons put forth by counsel warrants reopening these proceedings, particularly where there has been no evidentiary showing by the respondent that would warrant the relief originally requested, or that the decision of the immigration judge would be reversed. *See generally Matter of Haim*, Interim Decision 3060 (BIA 1988); *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979). Accordingly, the motion is denied.

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

File: A27 926 183—Phoenix Date: Jul. 15, 1988

In re: JAIRO JONATHAN *ELIAS*-ZACARIAS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Susan Giersbach-Rascon, Esquire
214 East Willetta
Phoenix, Arizona 85025

ON BEHALF OF SERVICE:

Linda Boone
General Attorney

CHARGE:

Order: Sec 241(a)(2), I&N Act [8 U.S.C. § 1251 (a)(2)]—Entered without inspection

APPLICATION: Asylum, withholding of deportation

DECISION OF THE BOARD OF IMMIGRATION APPEALS

ORDER:

PER CURIAM. The appeal is summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(i). The request for oral argument before the Board is denied. The respondent has in no meaningful way identified the basis of the appeal from the decision of the immigra-

tion judge. Respondent's counsel indicated on the Notice of Appeal (Form I-290A) dated December 4, 1987, that he would be filing a separate written brief or statement in support of his allegations of error after reviewing the transcript of the deportation hearing. We note that on May 10, 1988, a copy of the transcript was furnished to counsel, but that no brief or statement was filed within the time provided, and no explanation for this failure has been proffered. Such generalized statements as contained in the Notice of Appeal, without more, utterly fail to enlighten the Board as to the reasons, if any, for the appeal. *Martinez-Zelaya* v. *INS*, 841 F.2d 294 (9th Cir. 1988); *Matter of Lodge*, Interim Decision 3039 (BIA 1987); *Matter of Valencia*, Interim Decision 3006 (BIA 1986). Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director, and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Phoenix, Arizona

File No.: A 27 926 183

In the Matter of:

JAIRO JONATON ELIAS-ZACARIAS, RESPONDENT

December 4, 1987

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(2)—entered without inspection.

APPLICATION: Political Asylum, withholding of deportation, and in the alternative, voluntary departure.

ON BEHALF OF RESPONDENT:
Juan Rascon
Central American Refugee Project
6802 S. 24th Street
Phoenix, Arizona 85040

ON BEHALF OF SERVICE:
Linda Boone
Trial Attorney
230 N. First Avenue
Phoenix, Arizona 85025

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 19 year old single, male alien, a native and citizen of Guatemala who admitted the allegations on the Order to Show Cause and conceded the charge of deportability that he had entered the United States on or about July 12th 1987 without being inspected by a United States immigration officer. Deportability has been established and is not an issue. Guatemala was directed as the country of deportation. The respondent applied for political asylum, withholding of deportation, and in the alternative, voluntary departure. The application for political asylum is Exhibit 2 in the file, the State Department letter is Exhibit 3, documentary evidence submitted on behalf of the respondent is Exhibit 4, a certified copy of the I-213 is Exhibit 5 and some newspaper articles submitted by the Service are Exhibit 6.

The respondent testified that at some time around the end of January in 1987, two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home. Only he and his parents were there. He testified that the guerrillas asked his parents and himself to join with them, but they all refused. The guerrillas asked them why and told them that they would be back, and that they should think it over about joining them.

The respondent testified that he did not want to join the guerrillas because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas. The respondent testified that he left Guatemala at the end of March which was approximately two months after his family was

visited by the guerrillas. The respondent testified that he left Guatemala because he was afraid that the guerrillas would return. Respondent's parents still reside in Guatemala and apparently the guerrillas have not returned to their home. Respondent does have four brothers ranging in ages from 22 to approximately 33, however, they do not live at home with the parents.

During the two month period that the respondent remained in Guatemala he still resided at his home and he still went to work. He testified that he left Guatemala after talking it over with his parents. It appears that basically the respondent claims that he is afraid to return to Guatemala based on this one attempted recruitment by the guerrillas. There does not appear to be any evidence that this attempted recruitment by the guerrillas is any different than that experienced by other Guatemalans. The respondent has a cousin in the United States and has indicated that his cousin may be able to help him to obtain the funds to return to Guatemala. The Service submitted an I-123 to indicate that the respondent had stated that one of the reasons he came to the United States was for economic reasons. In view of the holding in *Garcia-Ramos* which indicates that one of the reasons an alien comes to the United States is for economic reasons that in and of itself would not prevent him from obtaining political asylum if he can establish persecution based on one of the other grounds provided for in the statute. It should be noted that at this time the respondent has been found to have been a credible witness.

Considering all the evidence, it does not appear that the respondent has established that he is a refugee within the meaning of 101(a)(42) of The Act. Re-

spondent has failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. He also has failed to show a clear probability of persecution for one of the aforementioned five grounds. Since his parents have not apparently had a return visit or any problems from the guerrillas the respondent has failed to show that if he is returned to Guatemala the guerrillas will seek him out. Accordingly, the respondent will be denied relief for either asylum or withholding of deportation.

Respondent has requested that he be granted the privilege to voluntary [sic] depart, and he does believe he can obtain funds to leave the country voluntarily. It appears that the respondent does not have any criminal record and there does not seem to be any bar to his leaving voluntarily should he have the funds necessary to pay his way out of the United States. The respondent will be granted this privilege.

ORDER

IT IS HEREBY ORDERED that the respondent's application for political asylum and/or withholding of deportation be and the same are hereby denied.

IT IS FURTHER ORDERED that the respondent be granted the privilege to voluntarily depart the United States by December 11, 1987 or any extension thereof as may be granted by the District Director.

/s/ Irene Weiss
IRENE WEISS
Immigration Judge

APPENDIX G

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 101(a)(42) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1101(a)(42), provides:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, as-

sisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 208(a) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158(a), provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101 (a)(42)(A) of this title.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20339

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

No. 90-1342

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

IMMIGRATION & NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. COLEMAN, JR.
PETER A. VON MEHREN *
NANCY L. MANZER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for Respondent
* Counsel of Record

April 19, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Should this Court grant certiorari to second-guess the Ninth Circuit's factual determination that left-wing guerrillas had political motives for threatening Jairo Jonathan Elias-Zacarias when he refused to join their movement to overthrow the Guatemalan government?

2. Should this Court grant certiorari when, contrary to what petitioner claims, there is no conflict between the circuits with respect to whether threats of forced recruitment by a guerrilla group can constitute persecution "on account of . . . political opinion" for the purposes of 8 U.S.C. § 1101(a)(42) (1988)?

PARTIES TO THE PROCEEDING

Respondent adopts petitioner's statement concerning the parties to this proceeding.

TABLE OF CONTENTS

	Page
STATEMENT	1
REASONS WHY THE PETITION SHOULD BE DENIED	10
I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER IS ASKING THIS COURT TO SECOND-GUESS PROPER INFERENCES THE NINTH CIRCUIT DREW FROM THE FACTS IN THE RECORD	10
II. NO CONFLICT PRESENTLY EXISTS BETWEEN THE NINTH AND ELEVENTH CIRCUITS WITH RESPECT TO WHETHER FORCED RECRUITMENT BY GUERRILLA GROUPS CONSTITUTES PERSECUTION ON ACCOUNT OF POLITICAL OPINION	14
CONCLUSION	17
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988)	6
Artiga Turcios v. INS, 829 F.2d 720 (9th Cir. 1987)	2
Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984)	6
Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984)	12
Florez-De Solis v. INS, 796 F.2d 330 (9th Cir. 1986)	11
In re Maldonado-Cruz, Int. Dec. 3041 (BIA 1982)	16
In re Momen, BIA unpublished dec. No. A27 208 (argued Oct. 10, 1985)	12
In re Noory, BIA unpublished dec. No. A24 001 415 (argued Oct. 28, 1985)	12
In re Salim, 18 I&N Dec. 311 (BIA 1982)	12
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	6, 7, 12
Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989)	6, 15, 16
Matter of A.G., Int. Dec. No. 3040 (BIA 1987)	12
McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981)	6
NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170 (1981)	10
Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292 (11th Cir. 1990)	14, 15, 16
Rodriguez-Rivera v. INS, 848 F.2d 998 (9th Cir. 1988)	11
Statutes:	
8 U.S.C. § 1101(a)(42) (1988)	2, 3
Miscellaneous:	
Che Guevara, *Guerrilla Warfare* 102 (1985)	13
Department of State, *Country Reports On Human Rights Practices for 1989*, 101st Cong., 2d Sess. 599 (Joint Comm. Print 1990)	2, 8
John Gerassi (ed.), *Venceremos! The speeches and writings of Ernesto "Che" Guevara* 277 (1968)	13
Regis Debray, *The Revolution on Trial* 269-270 (1977)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1342

IMMIGRATION & NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jairo Jonathan Elias-Zacarias respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The text of the Ninth Circuit's opinion is reproduced at Appendix A to the petitioner's brief. The opinion of the Board of Immigration Appeals and the oral opinion of the Immigration Judge are found at Petitioner's Appendices C and F. The record of the hearing before the Immigration Judge is set out in the Appendix to this brief.

STATEMENT

Petitioner asks the Court to review a decision by a unanimous panel of the Ninth Circuit which reversed the Board of Immigration Appeals' (the "BIA") determina-

tion that Mr. Elias-Zacarias had not established an entitlement to refugee status under 8 U.S.C. § 1101(a)(42)(1988). The Ninth Circuit found that the evidence at Elias-Zacarias' hearing before the Immigration Judge established that there was a "reasonable possibility" that a left-wing guerrilla group would carry out its threat to "take Elias by force" if he did not voluntarily join its political movement. Petitioner's Appendix at 18a (hereinafter, Pet. App.). Consequently, the court of appeals ruled that Elias-Zacarias had presented evidence satisfying the statutory requirement for refugee status, and it remanded the case to the BIA to exercise its discretion with respect to Elias-Zacarias' application for asylum. *Id.* at 25a.

While complaining about the manner in which the Ninth Circuit applied the substantial evidence test,[1] petitioner does not seriously challenge the conclusion by the panel that Elias-Zacarias' refusal to join the guerrillas was an expression of political opinion. Nor does petitioner contest the finding that the evidence established a "reasonable possibility" that the guerrillas would kidnap or kill Elias-Zacarias because he refused to join their revolutionary movement.[2]

Instead, petitioner contends that it was inappropriate for the Ninth Circuit to infer from the undisputed circumstances surrounding the confrontation between the

---

[1] Under the substantial evidence test, the court reviews the BIA's factual findings and reverses if they are not substantially reasonable. *See, e.g., Artiga Turcios v. INS*, 829 F.2d 723 (9th Cir. 1987).

[2] In this regard, the State Department has reported that, in 1989, Guatemalan guerrillas "were involved in extrajudicial killing in rural areas," and among those killed were "two repatriated refugees." Department of State, *Country Reports On Human Rights Practices for 1989*, 101st Cong., 2d Sess. 599 (Joint Comm. Print 1990).

guerrillas and Elias-Zacarias that the guerrillas' threats were "on account of . . . political opinion."[3] Petitioner's Brief at 8-9 (hereinafter, Pet. Br.). In this regard, petitioner argues that the Ninth Circuit was wrong when it found that the guerrillas had political motives for threatening Elias-Zacarias; petitioner suggests that the evidence presented to the Immigration Judge showed that the guerrillas were merely seeking to conscript him into "their army" so that he could "fight for them." Pet. Br. at 2-3.

In support of this pristine interpretation of the facts, petitioner states that both the Immigration Judge and the BIA held that threats of forced recruitment by guerrillas do not constitute persecution on account of political opinion. The facts are to the contrary: neither the Immigration Judge nor the BIA ever reached such a conclusion. Petitioner also tries to posit a conflict between the Ninth Circuit and Eleventh Circuit, arguing that these two circuits have enunciated different standards with respect to what facts must be shown in order to establish persecution in a case involving threats by a guerrilla group. Pet. Br. at 9-10. A review of the decisions from these circuits demonstrates that no such conflict actually exists.

Elias-Zacarias' Undisputed Testimony. At the hearing before the Immigration Judge, Elias-Zacarias testified that, during one evening in late January 1987, two men carrying machine guns and wearing handkerchiefs to conceal their faces, approached his family's home. Pet. App. at 6a-7a; Respondent's Appendix at 4a-6a (hereinafter Res. App.). These masked men identified themselves as members of the anti-government guerrillas and tried to pressure Elias-Zacarias and his parents into joining their revolutionary movement. Pet. App. at 7a; Res.

---

[3] 8 U.S.C. § 1101(a)(42)(1988).

App. at 5a. Elias-Zacarias refused to take up their cause. Pet. App. at 7a; Res. App. at 5a. As they left, the guerrillas told him "to think it [over] well" and that they would return. Pet. at App. 7a; Res. App. at 5a. Finally, Elias-Zacarias testified that, out of fear that the guerrillas would return and "take him" and "kill him," he left his family home and fled Guatemala. Res. App. at 5a. Elias-Zacarias' testimony was not disputed.

The Immigration Judge's Decision. The Immigration Judge believed Elias-Zacarias' testimony, saying that she found him to be a credible witness. Pet. App. at 41a. Despite finding that Elias-Zacarias was genuinely afraid of the guerrillas, however, she denied his application for asylum and withholding of deportation on two grounds. First, she implied that the guerrillas' threat was not sufficiently individualized to constitute persecution, saying that forced recruitment was something "experienced by other Guatemalans." *Id.* at 41a. Second, the Immigration Judge found that, since there was no evidence that the guerrillas had returned to his parents' home, Elias-Zacarias had not established that the guerrillas would seek him out for retribution. *Id.* at 42a. Petitioner distorts the record, therefore, when it suggests that the Immigration Judge's ruling was based on a finding that: (1) Elias-Zacarias had not been threatened when the guerrillas confronted his family, and (2) the guerrillas' effort to recruit him into their movement was not politically motivated.[4] Pet. Br. at 3.

The BIA's Denial of Elias-Zacarias' Application. On appeal, the BIA initially sought some procedural ground on which to avoid reaching the merits of the Immigration Judge's decision. To begin, the BIA summarily dismissed his initial appeal because it found that trial

[4] Indeed, petitioner's description of the Immigration Judge's decision is not even consistent with that set out by the BIA when addressing Elias-Zacarias' motion to reopen. *See* Pet. App. at 31a.

counsel failed to file a timely brief.[5] Pet. App. at 38a. Subsequently, the BIA denied Elias-Zacarias' motion for a rehearing, saying that it was actually a motion to reopen and no new evidence had been submitted. *Id.* at 35a. However, after Elias-Zacarias filed a motion to reopen and submitted additional evidence indicating that the guerrillas had returned to his home, the BIA finally addressed the merits of his claim. *Id.* at 27a-33a.

In denying Elias-Zacarias' application for asylum and withholding of deportation, the BIA held that, despite his credible testimony concerning his fears that the guerrillas would "take him," there was no evidence that the guerrillas generally engaged in forced recruitment and, consequently, there was no objective basis for his fear that they would kidnap or kill him. *Id.* at 32a. Subsequently elaborating on this conclusion, the BIA recognized the guerrillas' political motives for attempting to recruit Elias-Zacarias. The BIA said:

> In this case, the *guerrillas wanted [Elias-Zacarias] to join them*, and according to [his] father, even offered to pay [Elias-Zacarias] for his services. In [his] brief in support of his latest motion, he acknowledges that the subsequent visits by the guerrillas were also an attempt to recruit him in order for him to assist the guerrillas in *their attempt to violently overthrow the Guatemalan Government*. It can hardly be said that the guerrillas, in any of their visits, sought to harm [Elias-Zacarias] for having opinions they found offensive. . . . In the case now before us, [Elias-Zacarias] has not shown that any threats were directed towards him by the

[5] In its decision on the merits, the BIA admitted that it might have been responsible for his failure to file a brief, saying that there was no reason to disbelieve the sworn statement of Elias-Zacarias' trial counsel that the clerk for the BIA had misinformed her of the filing date. Pet. App. at 28a.

> guerrillas, only that *he was approached by them and asked to join.*

Id. at 32a-33a (emphasis added).

As the foregoing passage indicates, the BIA decision rests firmly on a finding that the guerrillas had not threatened Elias-Zacarias with forced recruitment when they approached his family's house. The BIA simply did not find, as petitioner would have the Court believe (Pet. Br. at 3), that Elias-Zacarias had failed to demonstrate that the alleged persecution was on account of political opinion. Indeed, it is significant that petitioner did not even raise that argument when initially defending the BIA's ruling in the Ninth Circuit.[6]

The Ninth Circuit's Decision. In holding that Elias-Zacarias had presented sufficient evidence to establish an entitlement to refugee status,[7] the Ninth Circuit applied the two-pronged test for demonstrating a "well-founded fear of persecution" that was adopted by this Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440-441 (1987). Under this well-accepted and often-applied test, the asylum applicant must demonstrate: (1) a genuine fear of

[6] This is not particularly surprising since a long line of Ninth Circuit opinions has held that, under circumstances like those found in this case, forced recruitment by a guerrilla organization can provide the basis for a claim of persecution on account of political opinion. *See, e.g., Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981).

[7] At the urging of petitioner's appellate counsel, the Ninth Circuit treated the BIA's ruling as both an affirmance of the Immigration Judge's decision on the merits of Elias-Zacarias' asylum application and a denial of his motion to reopen. Pet. Br. at 6. Consequently, when addressing the merits of the asylum application, the panel limited its review to the evidence presented to the Immigration Judge. Pet. App. at 6a & n.2.

persecution on account of "race," "religion," "nationality," "membership in a particular social group," or "political opinion," and (2) an objective basis for that fear. *See id.*

The Ninth Circuit found that Elias-Zacarias' testimony before the Immigration Judge met the first prong of this test. The panel noted that the BIA had not disturbed the Immigration Judge's finding that Elias-Zacarias had testified credibly that, as a consequence of his refusal to join the guerrillas in their efforts to overthrow the Guatemalan government, he was afraid that the guerrillas would return and kidnap or kill him. Pet. App. at 7a & n.3. The panel continued:

> There is no dispute that Elias' fear of persecution was genuine and that he thus satisfied the subjective test for eligibility for asylum. . . . *The dispute is over whether he satisfied the objective test and showed there was a reasonable possibility that the guerrillas would forcibly recruit him.*

Id. at 16a (emphasis added).

In addressing this second prong of the *Cardoza-Fonseca* test, the court of appeals began by pointing out that the BIA's "crucial error was its conclusion that the Guatemalan guerrillas do not engage in forced recruitment." *Id.* The panel then considered the significance of the State Department's advisory letter on Elias-Zacarias' application for asylum.[8] Although the State Department rejected Elias-Zacarias' application on the ground that forced recruitment by a guerrilla group does not entitle an applicant to asylum status,[9] the panel concluded that

[8] The Immigration Judge and the BIA both failed to analyze the State Department letter when addressing the merits of Elias-Zacarias' application.

[9] With respect to the State Department's letter, the panel found that the BIA had erred, as a matter of law, because it had failed to recognize that, since the guerrillas lacked legitimate authority

the letter did constitute "proof that the guerrillas do engage in forced recruitment." [10] *Id.*

Once it concluded that there was objective evidence that the guerrillas engaged in the practice of forced recruitment, the panel found that: (1) the BIA's failure to consider the significance of the State Department letter meant that it did not appreciate the threatening nature of the guerrillas' statement that Elias-Zacarias and his family should "think it [over] well" about joining the revolutionary movement; and (2) as a result, there was a reasonable basis for Elias-Zacarias' fear of being kidnapped or killed for refusing to join the guerrillas in their efforts to overthrow the government in Guatemala. *Id.* at 16a-17a. The panel found the undisputed evidence that the guerrillas carried machine guns and wore masks lent further credence to Elias-Zacarias' belief that he was being threatened.[11] *Id.* at 17a.

The Ninth Circuit then addressed the Immigration Judge's concern that, in this case, the guerrillas' failure to return to Elias-Zacarias' home indicated that they

---

to conscript persons into their movement, their efforts to recruit Elias-Zacarias could constitute persecution. Pet. App. at 12a & n.6.

[10] In addition, the Ninth Circuit also called attention to a State Department report written in February 1990 saying, *inter alia*:

> [T]he communist guerrillas increased their campaign of violence, which included destruction of public and private property, robbery, *forced recruitment and labor*, murder, and indiscriminate use of land mines.

Department of State, *Country Report on Human Rights Practices for 1989*, 101st Cong., 2d Sess. 597 (Joint Comm. Print 1990) (emphasis added).

[11] The panel also took special note of the fact that, at oral argument, "the lawyer for the INS indulged in the wholly unwarranted speculation that the guerrillas wore handkerchiefs not to conceal their faces but 'because it might have been dusty that day.'" Pet. App. at 17a & n.8.

were not interested in seeking him out for reprisals. The panel said that, even though Elias-Zacarias was not harmed during the two-month period during which he was preparing to leave Guatemala, this evidence was of "marginal probative value" because of the relatively short period of time involved. *Id.* The panel continued that the evidence showed the guerrillas did, in fact, engage in the practice of forced recruitment, and that they knew where Elias-Zacarias and his family lived so they could carry out their threat. *Id.* at 17a-18a. It concluded, therefore, that the guerrillas had the will and ability to kidnap or kill Elias-Zacarias in retaliation for his refusal to join their movement. *Id.*

Finally, the Ninth Circuit turned to the question of whether the evidence established that the guerrillas had political motives for threatening Elias-Zacarias. Pet. App. at 17a. The panel first considered whether there were any other possible motives for the guerrillas' threats. It determined that there was no evidence that the individual guerrillas at Elias-Zacarias' door had any personal quarrel with him or his family (Pet. App. at 18a), and that the government had not otherwise presented evidence indicating that it was inappropriate to employ the "common sense inference" that the guerrillas' interest in recruiting Elias-Zacarias was to "further the group's political goals." *Id.* The court of appeals concluded, therefore, that the evidence established that there was a reasonable possibility that the guerrillas would return to take Elias-Zacarias by force and, as a result, the BIA's decision denying his asylum application was not substantially reasonable. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER IS ASKING THIS COURT TO SECOND-GUESS PROPER INFERENCES THE NINTH CIRCUIT DREW FROM THE FACTS IN THE RECORD.

On a number of occasions, this Court has said that the granting of certiorari is not appropriate in cases where the lower court's determination turns, as here, on an evaluation of specific facts in the record. *See, e.g., NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981). In this case, there can be no doubt that petitioner is asking the Court to grant certiorari to second-guess the evidentiary conclusions of the court of appeals concerning the guerrillas' motives for threatening Elias-Zacarias. Indeed, petitioner's brief makes it quite clear that its request for certiorari ultimately rests on the argument that the Ninth Circuit acted inappropriately when it *inferred* that the guerrillas were motivated by political purposes. Pet. Br. at 14-16.

Although petitioner tries to transform this essentially factual dispute into a legal claim by suggesting that the Ninth Circuit had created a presumption in favor of an asylum applicant that alleges persecution by a guerrilla group (Pet. Br. at 16), petitioner does not say, nor could it say, that the Ninth Circuit has established an irrebuttable presumption that a threat by a guerrilla will be viewed as politically motivated even when the evidence indicates otherwise. In fact, a review of the Ninth Circuit's decisions demonstrates that it examines, on a case-by-case basis, the circumstances surrounding an alleged confrontation between an asylum applicant and guerrillas in order to determine whether any threats or acts of violence were politically motivated. Indeed, on a number of occasions, the Ninth Circuit has *upheld* BIA decisions rejecting an alien's request for asylum on the ground that the evidence concerning the initial confrontation reasonably supported a finding that the guerrillas' motives for threatening the alien were not political.

For example, in *Rodriguez-Rivera v. INS*, 848 F.2d 998 (9th Cir. 1988), the Ninth Circuit was confronted with evidence that a particular guerrilla had threatened to kill the applicant for asylum. Notwithstanding the fact that two other guerrillas were present when the threat was made, the Ninth Circuit found that the evidence did not reasonably support the conclusion that the threat was politically motivated. The applicant had not testified, or even implied, that the other guerrillas had any interest in killing him, that they had any interest in pursuing him, or that they knew where he lived. *Id.* at 1006. In these circumstances,[12] the Ninth Circuit concluded that the threatening guerrilla was merely expressing his personal desire to kill the applicant, unaccompanied by any political motive. Consequently, it upheld as substantially reasonable the BIA's finding that the threat was not made to advance the political aims of the guerrilla movement.[13] *Id.* at 1006-07.

The issue raised by this certiorari petition thus boils down to whether the evidence in this case supports the inference that the guerrillas were politically motivated when they threatened Elias-Zacarias. In this regard, petitioner's attack on the Ninth Circuit's factual determinations is based on the often-repeated cant that the evidence merely established that Elias-Zacarias was refusing to join "someone's army" and "fight for them," and there-

---

[12] The panel, when describing the *Rodriguez-Rivera* decision, specifically mentioned that asylum cases involving allegations of threats by guerrilla groups often require the reviewing court to draw inferences from the facts in the record to determine whether the BIA's decision is substantially reasonable. Thus, the panel said: "[T]he testimony countering the ordinary inference that Salvador, as a guerrilla, was threatening Rodriguez-Rivera in order to carry out the goals of the guerrillas (as opposed to his own personal goals) was crucial to the outcome of that case." Pet. App. at 14a.

[13] *See also Florez-De Solis v. INS*, 796 F.2d 330 (9th Cir. 1986) (despite some threats by guerrillas against the life of Florez-De Solis, the Ninth Circuit inferred from the evidence that the threats were either examples of random violence in El Salvador or an effort to collect a debt from a former employer of Florez-De Solis).

fore the motive for forcibly recruiting him does not constitute persecution on account of political opinion. Pet. Br. at 3, 17. The credible and undisputed testimony at the hearing concerning the circumstances surrounding Elias-Zacarias' confrontation with the guerrellias, however, fully supports the Ninth Circuit's ruling, notwithstanding petitioner's *ex post facto* attempt to prop up the BIA's decision.[14]

When describing this confrontation, Elias-Zacarias testified:

> [The guerrillas] came over and they said . . . then my parents came out and they asked [the guerrillas] who they were looking for . . . and [the guerrillas] asked *us if we wanted to join them.* Then we said, no. And, [the guerrillas] insisted why *we didn't want to join them.* And, [the guerrillas] said that the guerrillas were good, but *we didn't want to* . . . and they said that they were coming back.

Res. App. at 5a (emphasis added). Later in the hearing, in response to cross examination by petitioner's trial counsel, Elias-Zacarias reaffirmed that the guerrillas were interested in recruiting his entire family into their revolutionary movement. *Id.* at 9a.

---

[14] With respect to petitioner's argument that the BIA's decision was entitled to heightened deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) (Pet. Br. at 19-20), neither the Immigration Judge nor the BIA based its denial of Elias-Zacarias' application on a finding that the guerrillas lacked a political motive. In addition, the BIA has been inconsistent with respect to when the refusal to perform military service satisfies the statutory requirement for refugee status, concluding on a number of occasions that threats of punishment directed at an asylum applicant for refusing to join *someone's army* was persecution on account of political opinion. *See Matter of A.G.*, Int. Dec. 3040 (BIA 1987); *In re Salim*, 18 I&N Dec. 311 (BIA 1982); *In re Noory*, BIA unpublished dec. No. A24 001 415 (argued Oct. 28, 1985); *In re Momen*, BIA unpublished dec. No. A27 026 208 (argued Oct. 10, 1985). In circumstances like these, this Court has said that a reviewing court need not defer to an agency's determination. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 n.30 (1987).

This evidence undercuts petitioner's claim that the guerrillas only wanted to recruit *apolitical* fighters for their army.[15] Certainly, it would not make sense for a guerrilla group to recruit Elias-Zacarias' middle-aged parents into their guerrilla movement if their only motive was to recruit individuals to fight in their army.[16] To the contrary, the evidence supports the Ninth Circuit's "common-sense inference" that, in this case, the guerrillas had political motives when they confronted Elias-Zacarias about joining their movement aimed at overthrowing the Guatemalan government.[17]

---

[15] According to Ernesto "Che" Guevara, an influential Latin American revolutionary theorist who began his revolutionary career in Guatemala (*see* Regis Debray, *The Revolution on Trial* 269-270 (1977)), guerrilla movements should subject a new recruit to political indoctrination. For example, Che Guevara wrote: "The education of the guerrilla fighter is important from the very beginning of the struggle. This [education] should explain to them the social purpose of the fight and their duties, clarify their understanding, and give them lessons in morale that serve to forge their characters." *See* Che Guevara, *Guerrilla Warfare* 102 (1985).

[16] Even if this were their only motive, Che Guevara has said that guerrilla warfare "is politico-military" and it "is in this manner that it must be developed, and consequently, understood." *See* John Gerassi (ed.), *Venceremos! The speeches and writings of Ernesto Che Guevara* 277 (1968).

[17] Che's Guevara's writings on guerrilla warfare also provide support to the Ninth Circuit's "common-sense inference." In this regard, he wrote:

> Indoctrination should be continuous, and so should the struggle for unity of the workers, of the peasants, and of the other social classes that live in the zone, in order to achieve towards the guerrilla fighters a maximum homogeneity of attitude. This task with the masses, this constant work at the huge problem of relations of the guerrilla band with the inhabitants of the zone, must also govern the attitude taken toward the case of an individual recalcitrant enemy soldier: he should be eliminated without hesitation when he is dangerous. In this respect the guerrilla band must be drastic.

Guerrilla Warfare at 75.

II. NO CONFLICT PRESENTLY EXISTS BETWEEN THE NINTH AND ELEVENTH CIRCUITS WITH RESPECT TO WHETHER FORCED RECRUITMENT BY GUERRILLA GROUPS CONSTITUTES PERSECUTION ON ACCOUNT OF POLITICAL OPINION.

Petitioner also suggests that a conflict exists between the Ninth and Eleventh Circuits concerning the evidence necessary to establish entitlement to asylum when an applicant claims that he was threatened with violent retaliation for refusing to join a guerrilla group. Pet. Br. at 9-10. In support of this branch of its argument, petitioner points to the Eleventh Circuit's decision in *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990), saying that the court's ruling in that case is in conflict with the Ninth Circuit's decision here. Pet. Br. at 10. A review of that Eleventh Circuit opinion demonstrates, however, that it is clearly distinguishable on its facts and, as a result, no conflict presently exists between the circuits on this point.

In *Perlera-Escobar*, the Eleventh Circuit addressed an application for asylum and withholding of deportation by an individual *who had voluntarily joined a guerrilla band* and subsequently deserted. The Eleventh Circuit's analysis begins by noting that, "[i]n the absence of any evidence that the guerrillas are interested in him for political reasons, the BIA *inferred* from the record that Escobar is nothing more than a deserter." 894 F.2d at 1298 (emphasis added). The opinion continues that the BIA also *inferred* that, as a paramilitary organization, the guerrillas had to punish deserters in order "to maintain order and promote loyalty." *Id.* The *Perlera-Escobar* opinion concludes that, since the guerrillas' interest in the applicant stemmed from their need to preserve unity and order in their ranks, the BIA acted in a substantially reasonable fashion when it found that the threat of retaliation by a guerrilla group against a deserter did not constitute persecution on account of political opinion. *Id.*

Despite petitioner's assertions to the contrary (Pet. Br. at 13), the facts of *Perlera-Escobar* have no relevance to this case. Unlike *Perlera-Escobar*, where a single male had *volunteered for military service* with the guerrillas, Elias-Zacarias' entire family was threatened as a result of their collective refusal to join in the guerrillas' efforts to overthrow the Guatemalan government. In addition, there is absolutely nothing in the record suggesting that Elias-Zacarias ever indicated a willingness to join the guerrillas' revolutionary movement,[18] or that he otherwise knew anything that would cause them to consider him a threat to the effectiveness of their fighting force. In these circumstances, it would be inappropriate to infer, as the BIA did in *Perlera-Escobar*, that the guerrillas' threat against Elias-Zacarias was motivated by a desire to maintain order and unity within the ranks of the guerrillas' movement.

In addition, petitioner is wrong when it asserts that the alleged conflict between the Ninth and Eleventh Circuit is reflected in their differing treatment of the decision in *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989). Pet. Br. at 13 & n.5. In fact, these circuits' differing approaches to the *Maldonado-Cruz* case merely reflects that case's unique facts, which presented a close factual question with respect to whether Maldonado-Cruz was a deserter or an innocent victim of forced recruitment by a guerrilla band.

Maldonado-Cruz claimed that the guerrillas had forced him to join their movement and had subjected him to two days of political indoctrination before he escaped. *See Maldonado-Cruz v. INS* 883 F.2d at 789. The BIA treated Maldonado-Cruz as a deserter from a guerrilla organization and, consequently, ruled that the guerrillas'

---

[18] The Eleventh Circuit recognized exactly this distinction when it noted that, unlike the *Maldonado-Cruz* case, the record clearly established that Perlera-Escobar was not dragooned by the guerrilla. *See Perlera-Escobar v. INS*, 894 F.2d at 1297 & n.4.

motives were not political, but based on a desire to maintain unity and discipline within the guerrilla movement. *See In re Maldonado-Cruz*, Int. Dec. 3041, at 10 (BIA 1988). On appeal, the Ninth Circuit viewed the factual record in a different light, concluding that, since the guerrillas initially had forcibly recruited Maldondo-Cruz into their movement, he was not a deserter and their efforts to inflict physical harm on him constituted persecution on account of political opinion. *See Maldonado-Cruz v. INS*, 883 F.2d at 791.

Therefore, when the *Perlera-Escobar* court said that it found the BIA's decision in *Maldonado-Cruz* to be "persuasive and a statement of the BIA's position," [19] it was simply saying that, in a deserter case, it was appropriate to infer that threats of retaliation by a guerrilla group are motivated by a desire to maintain unity and order, not hostility to the political views of the applicant for asylum. In addition, since the Eleventh Circuit took care to distinguish the facts of *Perlera-Escobar* from *Maldonado-Cruz*, [20] it clearly left open the question of what inferences it might draw in a case where an asylum applicant alleged that a guerrilla group threatened violence in retaliation for his or her refusing to join their revolutionary movement. The alleged conflict between the circuits upon which the petition is based thus turns out to be two decisions based on materially different factual records, from which the two circuits drew different inferences concerning the motivations of the guerrillas who were threatening violence against the asylum applicant. No conflict in fact exists.

---

[19] *See id.*

[20] *See id.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES E. COLEMAN, JR.
PETER A. VON MEHREN *
NANCY L. MANZER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for Respondent

* Counsel of Record

April 19, 1991

APPENDIX

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Phoenix, Arizona

File No.: A 27 926 183

In the Matter of:
JAIRO JONATON ELIAS-ZACARIAS,
Respondent

December 4, 1987

IN DEPORTATION PROCEEDINGS

Transcript of Hearing

CHARGE: Section 241(a)(2)—entered without inspection.

APPLICATION: Political Asylum, withholding of deportation, and in the alternative, voluntary departure.

ON BEHALF OF RESPONDENT:

Juan Rascon
Central American Refugee Project
6802 S. 24th Street
Phoenix, Arizona 85040

ON BEHALF OF SERVICE:

Linda Boone
Trial Attorney
230 N. First Avenue
Phoenix, Arizona 85025

JUDGE FOR THE RECORD

This is Immigration Judge Irene Weiss in Phoenix, Arizona on December 4, 1987 conducting a deportation hearing in the matter of Jairo Jonaton Elias-Zacarias, A 27 926 183. Respondent is represented by one Juan Rascon. The Service is represented by Linda Boone, and the interpreter is Marlyn Maraboli interpreting in the Spanish language.

JUDGE TO MR. ELIAS

Q. What is your true and correct name?
A. Jairo Jonaton Elias-Zacarias.
Q. All right. The interpreter will translate English to Spanish for your benefit. You are here today with Juan Rascon, does he represent you in these proceedings?
A. Yes.

JUDGE TO MR. RASCON

Q. Mr. Rascon, it should be noted for the record that you are the Director of the Central American Refugee Project, is that correct?
A. That's correct.
Q. And, I have an Order to Show Cause issued July 12th 1987, do you concede service?
A. Yes, I do.
Q. We will mark that as Exhibit 1. And, do you waive a reading and an explanation of the rights to the respondent?
A. Yes, I do.
Q. And, are you prepared to plead to the allegations and charge contained on the Order to Show Cause?
A. Yes, Your Honor, respondent admits and concedes the allegations contained on the Order to Show Cause.
Q. Thank you. And, are you designating a country?
A. We reserve designation of a country, Your Honor.
Q. All right. I will direct Guatemala since the respondent is a native and citizen of Guatemala. And, the relief your requesting?

A. We're seeking asylum and withholding of deportation.
Q. And, are you seeking voluntary departure in the alternative?
A. Yes. In the alternative.
Q. We will admit the application for asylum as Exhibit 2 and the State Department letter as Exhibit 3 and were there any other preliminary matters?
A. Your Honor, I would like to submit a packet of background documentary information. This application we recently made the commitment of the respondent to represent him, so we had not done so previously. So, I'll serve the Government and court with a copy.
Q. I'll mark that as Exhibit 4.

JUDGE TO MR. ELIAS

Q. Will the respondent please stand and raise his right hand to be sworn. Do you solemnly swear that the testimony you will give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?
A. Yes.
Q. Thank you. Please be seated.

MR. RASCON TO MR. ELIAS

Q. Mr. Elias, how old are you?
A. Nineteen.
Q. And, where are you from?
A. Guatemala.
Q. What city in particular?
A. Orientapeca (phonetic sp.).
Q. And, when did you leave Guatemala?
A. At the end of March.
Q. Of this year?
A. Yes. Of this year.

Q. And, why was it that you left Guatemala?
A. Simply because of the problem that . . . the guerrillas came over to my house.
Q. And, when did this happen?
A. That happened at the end of the month of January.
Q. That was this year?
A. Yes, this year.
Q. And, who were these individuals, do you know?
A. No, I don't know. They were two persons.
Q. Do you know what organization they represent?
A. They didn't . . . they didn't let us know what organization they belonged to, but they only . . . I only know that they were guerrillas.
Q. Did they . . . excuse me . . . did they tell you that they were guerrillas?
A. Yes, they told me.
Q. And, how many of them were there?

MS. MARABOLI TO MR. RASCON

Could you repeat that please.

MR. RASCON TO MR. ELIAS

Q. How many of them were there?
A. There were two.
Q. Were they armed?
A. Yes, they were armed.
Q. Were they uniformed?
A. Yes.
Q. What kind of uniform did they have?
A. They had a military uniform.
Q. Did they wear anything else of distinction?
A. Yes, they had handkerchiefs on their mouth.
Q. So they had part of their face covered?
A. Covered, yes.
Q. What time of day did they come to your house?
A. It was around Tuesday.

Q. What time?
A. It was around 6:30 in the afternoon.
Q. Was it still light out or was it dark?
A. No. It was getting dark.
Q. How did you notice . . . or how did they arrive at your house?
A. They came over and they said . . . then my parents came out and they asked them who they were looking for . . . and they asked us if we wanted to join them. Then we said, no. And, they insisted why we didn't want to join them. And, they said that the guerrillas were good, but we didn't want to . . . we didn't want to and they said that they were coming back. That we'd better think it well, and then they left.
Q. Just why didn't you want to join the guerrillas?
A. Because they see very well, that if you join the guerrillas . . . then you are against the government. You are against the government and if you join them then it is to die there. And, then the government is against you and against your family.
Q. So, were you afraid to join the guerrillas?
A. I was afraid to join the guerrillas, yes.
Q. So, after this visit by the guerrillas what did you do?
A. I remained there for some time and then I came here.
Q. What did you do during the time that you remained there?
A. Nothing. Because they said that they were coming back.
Q. Did you continue to work?
A. Yes, I was working.
Q. When did you leave Guatemala?
A. At the end of March.
Q. Just why did you decide to leave Guatemala?
A. Simply because I was afraid and I was thinking that they were coming back and that they could take me and kill me.

Q. Do you have any idea what would have happened to you if they would have returned and found you again?

MS. BOONE TO JUDGE

Objection, Your Honor, speculative.

JUDGE TO MR. RASCON

Sustained.

MR. RASCON TO MR. ELIAS

Q. When you decided to leave who did you talk this decision over with?
A. With my parents.
Q. What did they tell you? What advice did they give you?
A. That it would be better if I abandoned the country.
Q. Did they tell you why it would be better?
A. Yes. So, I don't join the guerrillas and I won't be against the government.
Q. Are you still afraid to return to Guatemala?
A. Yes.
Q. Could you explain to the court why you're afraid?
A. Simply . . . as soon as I get there to Guatemala . . . these people can come back. Maybe to take me or kill me.
Q. You said that these guerrillas were armed?
A. Yes.
Q. Did you see what kinds of weapons they had?
A. I only saw that they were machine guns.
Q. Did they ever point those weapons at you?
A. No.
Q. So, they didn't threaten you with these weapons?
A. No.
Q. When you left your home town of Orientapeca?
A. The same day like two days before.
Q. When you left Orientapeca where did you go?
A. I came to Mexico.

Q. How did you travel from your hometown to Mexico?
A. By bus.
Q. Did you obtain documents for you to leave Guatemala?
A. No documents . . . no personal documents.
Q. So you didn't obtain a passport or any type of permission to leave Guatemala?
A. No.
Q. And, why not?
A. Because of lack of money. It was easier for me to leave without papers.
Q. When you got to the border of Mexico and Guatemala, did you present yourself to the authorities at the border?
A. No.
Q. So, you didn't talk to any of the authorities at the border?
A. No.
Q. So how did you cross into Mexico?
A. From one of side of Immigration.
Q. So you went around them?
A. Just like . . . let's say through the mountains, through the hills.
Q. Did you obtain permission to remain in Mexico?
A. No.
Q. So, the whole time you were in Mexico you were there illegally?
A. Yes.
Q. Are you now in time to return to Mexico?
A. Yes.
Q. Do you have the legal rights?
A. No.
Q. Okay.

MR. RASCON TO JUDGE

That's all the questions regarding asylum, Your Honor. I would like to ask him regarding voluntary departure.

MR. RASCON TO MR. ELIAS

Q. Mr. Elias, if it were necessary, could you afford the transportation to leave the United States?

A. Yes.

Q. Do you have the money?

A. No. But I could get it maybe with my cousin.

Q. Have you ever been convicted or arrested for any crime anywhere in the world?

A. No.

Q. Have you ever been deported from the United States?

A. No.

Q. And, if it were necessary would you obey the Judge's order to return voluntarily?

A. Yes.

MR. RASCON TO JUDGE

I'm sorry. One other question regarding the asylum matter. I'm sorry.

MR. RASCON TO MR. ELIAS

Q. Why didn't you relocate to another part of Guatemala after the incident with guerrillas in January?

A. Simply because in other places I don't have family and if you go to another place they look at you strange there and they think that you are something with the guerrillas.

MR. RASCON TO JUDGE

That's all, Your Honor.

JUDGE TO MS. BOONE

Q. You may cross-examine?

A. Thank you.

MS. BOONE TO MR. ELIAS

Q. When the guerrillas came to your house who was present?

A. My father and my mother and myself.

Q. None of your brothers were there?

A. No.

Q. And, the guerrillas were questioning you . . . were they also questioning your parents?

A. Yes.

Q. Were they also asking your parents to join them?

A. Excuse me?

Q. Were they also asking your parents to join them?

A. Yes.

Q. Do they know of your brothers?

A. No.

Q. Did they know you or your parents personally?

A. I don't think so.

Q. Have they ever come to your house before?

A. No.

Q. Have you ever had any contacts with your parents since you left Guatemala?

A. Yes.

Q. Have you parents or your brothers been threatened since you left Guatemala?

A. No.

Q. Did any . . . what are the ages of your brothers?

A. Actually I don't know . . . I don't have any idea.

Q. Approximately?

A. One is around 22. Another one is 24. Another one is 27. And, the other one is around 33, something like that.

Q. Well, do they all live with your parents in the same house?

A. No.

Q. Do they live in the same area?

A. Yes.

Q. Do you parents live alone?

A. Yes.

Q. And, I correct that your brothers have not been recruited by the guerrillas?

A. No.

Q. You told the Judge that you had a cousin in the United States?

A. Yes.

Q. Did this cousin encourage you to come to the United States?

A. No.

Q. Do you recall when you were taken into custody by the immigration?

A. Yes.

Q. At the time were you questioned by an immigration officer?

A. I don't understand.

Q. When you were taken into custody by the United States Immigration Service, were you not questioned at that time about your entrance into the United States?

A. Yes.

Q. And, did you not tell an officer that your cousin had told you about the United States?

A. No.

Q. Did you tell that officer that you came here to try to get a better job?

A. Yes.

Q. When you were working . . . for the month of March of this year, is this the place where you had been working before?

A. Yes.

Q. And, then you left the country at the end of March, did you have any problems getting out of the country?

A. No. I did not have problems.

Q. Did any guerrilla or government authorities question you?

A. No.

Q. Is it true that you had no problems between the end of January and the end of March when you left Guatemala?

A. Only when the guerrillas came at the end of January.

Q. But from the time that the guerrilas came at the end of January, until you left the country at the end of March, were there any guerrillas or government authorities that bothered you?

A. Not to me.

Q. Do you know where your cousin in the states lives?

A. Yes.

Q. And, do you know what his status is in the country?

A. No.

Q. Do you know if he has a job?

A. No. I don't know.

Q. Have you had any contact with him since you've been here in the United States?

A. Yes.

Q. And, has he expressed to you he would assist you financially if you needed the money?

A. Yes, but he tells me that he cannot help me.

Q. And, le'ts just clarify for the Judge . . . if the Judge is to grant you what is called voluntary departure, you will have to pay our own way back to Guatemala?

A. Yes.

Q. Will your cousin be able to help you pay your way?

A. Possibly.

MS. BOONE TO JUDGE

I have nothing further, Your Honor. At this time the Service would like to offer to the court the certified copy of the I-213 that was prepared in Mr. Elias' case and am serving a copy of that on Mr. Rascon at this time, and I I'd also like to offer, and ask the court to mark for identification, three newspaper articles from the Arizona Republic which give information on the most current conditions in Guatemala since leading up to the recent peace plan which was signed in Guatemala City.

JUDGE TO MS. BOONE

Q. This is supposed to be letter size.
A. I did reduce it from a page size. I apologize if it's supposed to be an 8-½ X 11.

JUDGE TO MR. RASCON

Q. Mr. Rascon, do you have any objection to the I-213?
A. No, Your Honor.
Q. We will mark it as Exhibit 5 and 6, respectively. Mr. Rascon, do you have any redirect?
A. Yes, just one question, Your Honor.

MR. RASCON TO MR. ELIAS

Q. Besides your cousin, has anyone else offered to help you?
A. Yes.
Q. Do you know what that person does for a living?
A. Work.
Q. But do you know his occupation?
A. No.
Q. How did you meet this person?
A. He was at the detention center where I was.
Q. So, did he offer you any type of help?
A. Yes. Monetary help.

MR. RASCON TO JUDGE

Nothing further, Your Honor.

JUDGE TO MR. RASCON

Q. All of the information that you submitted . . . the documentation . . . is of a general nature. None of that is referring to the respondent, is that correct?
A. All of it is background information. It does not name the respondent by name.

Q. Do you have any other witnesses?
A. No, Your Honor.
Q. Would you want to make a closing statement?
A. The respondent waives closing argument, Your Honor.
Q. Okay.

JUDGE TO MS. BOONE

Q. Does the Service want to make a closing statement?
A. Just briefly, Your Honor. It's the Service's position that under the guidelines of *Matter of Mojarabi* and *Inez vs. Cardoza-Fronseca* the respondent has failed to establish a well-founded fear of persecution. He had only one visit by alleged guerrillas at the end of January 1987 who threatened allegedly himself and his parents. However, his testimony doesn't establish that they were actually threatened. If I remember correctly he said that they asked his family to consider joining them. That they had better think about it, and that they would possibly come back and yet the respondent continued to work up until the end of March which would have been a period of approximately two months and continued living at home and has had contact with his family and they have not had any threats. Apparently, the guerrillas have not come back to the lcoation, and therefore there has been no showing that the persecutor has either the inclination or the capability of punishing or attempting to overcome a idea, belief, or characteristic that Mr. Elias would possess and I would submit therefore that he has not established a well-founded fear of persecution which would be required for a grant of asylum and withholding of deportation.

MR. RASCON TO JUDGE

Q. Your Honor, respondent's testimony has been credible, honest, and consistent with the I-589 and his testi-

mony today . . . his fear is an objective one based an incident that occurred in January 1987. As best as the respondent knows, those individuals could still return to his home and could still attempt to obligate or force the respondent to join the guerrillas. The respondent was very clear in that he does not desire to join the guerrillas and it is his fear that the guerrillas would therefore persecute him or kill him. The respondent is very clear in that he does not wish to serve the guerrillas, in view of the fact that if he did so the government would in turn persecute him and possibly his family. So, his case today is based on that fear. That if he continues to avoid the guerrillas that he would suffer persecution and as well as the fact that if he joined the guerrillas he would also bring upon himself potential persecution from the government as well.

JUDGE RENDERS ORAL DECISION

JUDGE TO MR. RASCON

Q. Mr. Rascon, you've heard my decision, are you reserving?

A. Yes, Your Honor.

Q. As you know, you have ten days in which to file your notice of appeal?

A. Yes, Your Honor.

MS. BOONE TO JUDGE

Q. Service waives.

A. Thank you.

JUDGE FOR THE RECORD

Since there is nothing further at this time, this decision is final. This hearing is closed.

HEARING IS CLOSED

Supreme Court, U.S.
FILED
MAY 3 1991
OFFICE OF THE CLERK

(3)

No. 90-1342

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:	Page
Florez-De Solis v. *INS*, 796 F.2d 330 (9th Cir. 1986).....	3
Perlera-Escobar v. *Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990).....	4
Rodriguez-Rivera v. *INS*, 848 F.2d 998 (9th Cir. 1988)...	3
Statutes:	
Refugee Act of 1980, 8 U.S.C. 1101(a)(42)(A).....	1-2

In the Supreme Court of the United States

OCTOBER TERM, 1990

NO. 90-1342

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent attempts in his brief in opposition to persuade the Court that this case involves only the application of settled principles to particular facts, and also to show that there is no conflict between the circuits. Both attempts fail. The case presents an important question of law on which the circuits are squarely divided.

1. As the case comes to this Court, there is no longer any dispute between the parties about whether respondent reasonably feared that he would be forcibly recruited by the guerrillas if he returned to Guatemala. The *sole* question in the case is whether

respondent's fear of forcible recruitment is a fear of persecution "on account of * * * political opinion" within the meaning of the Refugee Act of 1980, 8 U.S.C. 1101(a)(42)(A). The court below held that it is, because "there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [respondent] to further the *group's* political goals." Pet. App. 18a.[1]

a. For reasons stated in our petition (at 14-20), we strongly disagree with the Ninth Circuit's rule that, at least in the absence of proof to the contrary, one threatened with harm when a group seeks to further its political goals is necessarily being persecuted on account of *his* political opinions. The implications of that rule extend beyond forcible recruitment to all victims of factional political violence—indeed, to anyone threatened not because of his political beliefs but because of the political nature of a group's objectives and the means it chooses to attain them.

[1] Respondent attempts to cloud this straightforward question at a number of points. For example, he argues, Br. in Opp. 12-13, that the court below viewed the case as involving the attempted recruitment and indoctrination of the entire Zacarias family. Whatever evidence there may be for such an inference, it is clear that the court below viewed the case as involving only the forced recruitment of respondent himself. The phrase quoted in text is the entire ground for the court's conclusion that respondent was threatened with persecution on account of his political beliefs.

At another point, respondent interprets our brief as claiming that "the guerrillas only wanted to recruit *apolitical* fighters for their army." Br. in Opp. 13. Of course, we make no such claim. To the contrary, recruitment of political neutrals *because* they are neutrals would be "on account of" the conscripts' political opinion, while conscription of able-bodied males regardless of their political beliefs would not.

Nor can the result below draw support, as respondent seems to think, Br. in Opp. 13 nn.15-17, from the possibility that the guerrillas may agree with Che Guevara that guerrilla fighters, once recruited, must be indoctrinated in the guerrillas' cause. See point 2, *infra*.

That the Ninth Circuit has such a rule is fully borne out not only by its opinion in this case but by the cases cited by respondent. Thus, as respondent recognizes, Br. in Opp. 6 n.6, a number of Ninth Circuit decisions uphold claims of persecution on similar facts. And the only Ninth Circuit cases offered (*id.* at 11) to show that the question here is just an evidentiary one in fact serve to underscore the vitality of that court's rule. Thus, in *Rodriguez-Rivera* v. *INS*, 848 F.2d 998 (9th Cir. 1988) (per curiam), the claim of persecution was rejected only because the panel concluded that the threat to the claimant was not a threat on behalf of the guerrillas as an organization but rather was a purely personal threat from an individual who was no longer alive. *Id.* at 1006. And in *Florez-De Solis* v. *INS*, 796 F.2d 330 (9th Cir. 1986), the case did not involve forcible recruitment at all. Rather, the question was whether a particular threat of reprisal was based on the guerrillas' identification of the alien with the political views of her employer. *Id.* at 335.

b. Respondent attempts to deflect attention from the important legal issue presented by asserting—more than 12 times, Br. in Opp. 3, 4, 5, 6, 9, 10, 11, 12 n.14, 13—that the guerrillas threatened him for "political motives" and that our petition "rests on the argument that the Ninth Circuit acted inappropriately when it *inferred* that the guerrillas were motivated by political purposes," *id.* at 10. As our petition made clear, Pet. 8-9, 11-13, 15-16, however, our disagreement is *not* with the *factual* deduction that guerrillas have political motives for threatening young men like respondent, but with the Ninth Circuit's quite different *legal* inference (or presumption, see Pet. 16-17 nn. 9-10) that politically-motivated threats necessarily constitute persecution "on account of * * * political opinion." When a person receives a threat that is issued in order to achieve a political objective, it does not follow that the person has been threatened "on account of" his politi-

cal opinions.[2] In this case, in fact, the Board of Immigration Appeals specifically stated that the guerrillas sought to recruit respondent only so that he could assist them in their efforts to overthrow the Guatemalan government—"even offer[ing] to pay the respondent for his services." Pet. App. 32a. Under these circumstances, the BIA concluded, "[i]t can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent *for having opinions they found offensive*." *Id.* at 32a-33a (emphasis added).[3] Respondent's brief is puzzlingly blind both to the basis of the BIA's decision and to the important legal issue raised by the Ninth Circuit's erroneous holding in this case.

2. Respondent's efforts to deny the existence of a circuit conflict are equally unavailing. Like the present case, the Eleventh Circuit's decision in *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292 (1990) (per curiam), involved an alien who feared that harm would come to him because he refused to serve in a guerrilla force (in Perlera Escobar's case, in El Salvador). In direct contrast to the court below, the

[2] The lower court's reliance on the political motivation for the guerrillas' threat does serve to distinguish this case from *INS* v. *Cañas-Segovia*, No. 90-1246 (filed Feb. 6, 1991). The Ninth Circuit there held that, in the circumstances of government recruitment of a conscientious objector, asylum eligibility does not require *any* proof of the alleged persecutor's motivation. 90-1246 Pet. App. 17a-19a. Here, on the other hand, the Ninth Circuit did look to the persecutor's motivation but then held that proof of motive to persecute an individual "on account of * * * political opinion" is satisfied by evidence of the alleged persecutor's political motivation. Thus, reversal of the judgment in *Cañas-Segovia* would not necessitate reversal of the judgment in this case. We therefore urge the Court to grant the petition here as well as in *Cañas-Segovia*.

[3] In light of the BIA's finding, respondent is entirely in error in suggesting that the agency is not entitled to *Chevron* deference in its view of the statute because "neither the Immigration Judge nor the BIA based its denial of [respondent's] application on a finding that the guerrillas lacked a political motive." Br. in Opp. 12 n.14.

Eleventh Circuit rejected the alien's claim that any harm inflicted on him would be "on account of * * * political opinion," reasoning that "the guerrillas care not what Escobar thinks or believes." *Id.* at 1298. Thus, the Eleventh Circuit could not have sustained the alien's claim in this case, as the Ninth Circuit plainly did, by simply "inferring" that as a result of respondent's unwillingness to further the group's political objectives by serving, he was threatened with harm "on account of" his political opinions.

There is, as respondent notes, Br. in Opp. 14-16, one factual difference between this case and *Perlera-Escobar*. Here, the alien was resisting forced recruitment, and there the alien had deserted the guerrilla force. But that difference only serves to intensify the conflict. If, as respondent contends, guerrilla groups are likely to attempt continual and pervasive indoctrination of their recruits, then one who deserts might perhaps be suspected of deserting because he rejects the guerrillas' creed. Those who are being recruited, on the other hand, are more likely to be pitied than censured for their political ignorance. Thus, the Eleventh Circuit would be even more resistant to the Ninth Circuit's approach in the context of recruitment than in the context of desertion.

For the foregoing reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1991

(4)

No. 90-1342

Supreme Court, U.S.
FILED
JUN 27 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

CHRISTOPHER J. WRIGHT
Acting Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

LAURI STEVEN FILPPU
ALICE M. KING
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The Refugee Act of 1980 requires an alien seeking asylum to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), 1158(a). The question presented is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution "on account of" that person's political opinion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	3
Summary of argument	9
Argument:	
A guerrilla organization's attempt to coerce a person into performing military service is not necessarily persecution "on account of * * * political opinion" within the meaning of the Refugee Act	12
A. Persecution "on account of * * * political opinion" means the infliction of suffering because of the victim's political beliefs	12
B. The guerrillas' attempt to coerce respondent into performing military service manifests their intent to field an army, not their intent to persecute respondent on account of his political beliefs	27
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Acosta, Matter of, 19 I. & N. Dec. 211 (BIA 1985)	24, 25, 29
Canas, Matter of, 19 I. & N. Dec. 697 (BIA 1988)	23, 26
Chapman v. *United States*, No. 90-5477 (May 30, 1991)	12-13
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	23, 24
EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 (1981)	24
Eastern Airlines, Inc. v. *Floyd*, 111 S. Ct. 1489 (1991)	16

Cases—Continued: Page

Fort Stewart Schools v. *FLRA*, 110 S. Ct. 2043 (1990) 24
Fuentas, Matter of, 19 I. & N. Dec. 658 (BIA 1988) 23
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 7, 13, 14-15, 16, 19, 23
INS v. *Stevic*, 467 U.S. 407 (1984) 7
Maldonado-Cruz, Matter of, 19 I. & N. Dec. 509 (BIA 1988), rev'd, 883 F.2d 788 (9th Cir. 1989) 26
Massachusetts v. *Morash*, 490 U.S. 107 (1989) 24
Mogharrabi, Matter of, 19 I. & N. Dec. 439 (BIA 1987) 24, 25
Pension Benefit Guaranty Corp. v. *LTV Corp.*, 110 S. Ct. 2668 (1990) 24
Perlera-Escobar v. *Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990) 21, 23, 25, 27, 28
Rodriguez v. *United States*, 480 U.S. 522 (1987) 18
Rodriguez-Majano, Matter of, 19 I. & N. Dec. 811 (BIA 1988) 23, 26
Sullivan v. *Everhart*, 110 S. Ct. 960 (1990) 24
Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 24
Vigil, Matter of, 19 I. & N. Dec. 572 (BIA 1988) 26
West Virginia Univ. Hospitals, Inc. v. *Casey*, 111 S. Ct. 1138 (1991) 18

Treaties, constitution, statutes, and regulation:

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 152 10
189 U.N.T.S. 184 16
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6225, T.I.A.S. No. 6577 ..... 10, 15-16
19 U.S.T. 6257 16
International Refugee Organization, Const., Annex 1, Pt. 1, 62 Stat. 3037:
§ A1(a)-(c), 62 Stat. 3049 15
§ A3, 62 Stat. 3049-3050 15
§ C1(a)(i), 62 Stat. 3050 15

Statutes and regulation—Continued: Page

Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:
§ 101(a)(42), 8 U.S.C. 1101(a)(42) 2, 22
§ 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) 4, 9, 12, 13
§ 207(e), 8 U.S.C. 1157(e) 20
§ 208(a), 8 U.S.C. 1158(a) 3, 29
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 3
§ 201(a), 94 Stat. 102-103 2
§ 201(b), 94 Stat. 104-105 20
§ 201(b), 94 Stat. 105 3
8 C.F.R. 208.13 29

Miscellaneous:

Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 17
Cassell's French Dictionary (1962) 16
125 Cong. Rec. (1979):
pp. 23,224-23,225 ..... 18, 19
p. 23,232 ..... 20, 21
p. 37,201 20
H.R. 2816, 96th Cong., 1st Sess. (1979) 18
H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. (1980) 18-19
H.R. Rep. No. 608, 96th Cong., 1st Sess. (1979) 17-18, 20
International Refugee Organization, *Manual for Eligibility Officers No. 175* (1950) 15
Office of the U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva Sept. 1979) 25
Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 19

Miscellaneous—Continued:	Page
S. 643, 96th Cong., 1st Sess. (1979)	18, 19
S. Conf. Rep. No. 590, 96th Cong., 2d Sess. (1980)	16, 19
S. Rep. No. 256, 96th Cong., 1st Sess. (1979)	16, 18
7 *The Oxford English Dictionary* (1933)	13
The Random House Dictionary of the English Language (1966)	13
The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. (1979)	17
Webster's Second New International Dictionary of the English Language (1957)	13

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1342

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The amended opinion of the court of appeals, Pet. App. 5a-25a, is reported at 921 F.2d 844. The initial opinion of the court of appeals is reported at 908 F.2d 1452. The opinion of the Board of Immigration Appeals denying respondent's motion to reopen his deportation proceeding, Pet. App. 27a-33a, is unreported. The opinion of the Board of Immigration Appeals denying respondent's motion for reconsideration of its dismissal of respondent's appeal, Pet. App. 34a-36a, is unreported. The opinion of the Board of Immigration Appeals dismissing respondent's appeal, Pet. App. 37a-38a, is unreported. The oral opinion of the Immigration Judge, Pet. App. 39a-42a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A petition for rehearing was denied on January 10, 1991. Pet. App. 26a. The petition for a writ of certiorari was filed on February 25, 1991, and was granted on May 13, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 201(a) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102-103, added Section 101(a)(42) to the Immigration and Nationality Act of 1952 and is codified at 8 U.S.C. 1101(a)(42). It provides:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality,

membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 201(b) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 105, added Section 208(a) of the Immigration and Nationality Act and is codified at 8 U.S.C. 1158(a). It provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

STATEMENT

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, limits eligibility for asylum to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). A "refugee" is defined to be any person who has left his native country and is unwilling to return there "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular

social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

Respondent Jairo Jonathan Elias Zacarias left his native Guatemala after two masked guerrillas armed with machine guns asked him to join their army and, when he declined to join, told him to "think it [over] well." Pet. App. 7a. In his deportation proceeding, respondent applied for asylum and withholding of deportation on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion. The Immigration Judge and the Board of Immigration Appeals denied the requested relief because the guerrillas did not threaten to harm respondent if he refused to join them, and because any implicit threat was not "on account of" his political opinion.

The Ninth Circuit reversed and found respondent eligible for asylum. It held that the Guatemalan guerrillas' practice of forcible recruitment made it reasonable for respondent to take the admonition to "think it [over] well" as a threat. Pet. App. 16a-17a. Moreover, the court said that the threat was "properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Id.* at 12a. On the basis of its conclusion that respondent was a "refugee" within the meaning of the 1980 Act, the court of appeals remanded for the BIA to determine whether respondent should be granted asylum. *Id.* at 25a.

1. Respondent was eighteen years old when he left his native Guatemala in March 1987, a few months after two masked guerrillas came to his home. The guerrillas were armed with machine guns and asked

respondent to join their army. Respondent refused to join, even though the guerrillas offered to pay him to fight for them. The guerrillas told respondent to "thing it [over] well" and said that they would be back. Respondent remained at home and continued to work at his regular job for the next two months before he decided to leave Guatemala for the United States. Pet. App. 6a-7a, 32a, 40a-41a; C.R. at 37.

2. Respondent was apprehended for entering the United States without inspection. In his deportation hearing, respondent conceded his deportability and requested asylum and withholding of deportation. Pet. App. 40a. The Immigration Judge denied the requested relief. "Considering all the evidence," the Immigration Judge determined that "it does not appear that the respondent has established that he is a refugee within the meaning of 101(a)(42) of The Act" because he has "failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Pet. App. 41a-42a.

3. The Board of Immigration Appeals (BIA) summarily dismissed respondent's appeal when his counsel failed to file a brief or statement on his behalf. Pet. App. 38a. Respondent then moved the BIA to reconsider its dismissal. The BIA denied the motion for reconsideration; treating the motion as one to reopen respondent's deportation proceeding, it denied the motion because "there has been no evidentiary showing by the respondent that would warrant the relief originally requested, or that the decision of the immigration judge would be reversed." *Id.* at 36a.

Respondent then moved the BIA to reopen his deportation proceeding and to consider new evidence in

support of his appeal. The new evidence was a letter from respondent's father saying that the guerrillas had visited the family's home twice since respondent left Guatemala: once in January 1988, and again in April 1988. In the January visit, the guerrillas asked for respondent's father and mother and left when they found that the father was not at home. In the April visit, the guerrillas asked for respondent, but were told that he was in the United States. Both visits were for the purpose of attempting to recruit respondent. Pet. App. 31a.

The BIA determined that the letter from respondent's father "not only has failed to sustain his burden for reopening, * * * but also has failed to produce evidence that would establish a well-founded fear of persecution under the Act." Pet. App. 31a. "Even though the respondent alleges that he was threatened by the guerrillas, the evidence of record does not bear this out"; "there was no threat made to the respondent that he would be harmed if he refused to join them." *Id.* at 32a. Even if the guerrillas had threatened respondent, the BIA held, it was for the purpose of satisfying their need for soldiers and not "on account of" any political opinion held by respondent:

> [I]n our decisions in *Matter of Vigil*, Interim Decision 3050 (BIA 1988), and *Matter of Maldonado*, Interim Decision 3041 (BIA 1988), we opined that when a guerilla organization attempted to recruit someone, the initial encounter was important to examine in order to determine the motivations of the guerrillas. In this case, the guerrillas wanted the respondent to join them, and according to respondent's father, even offered to pay the respondent for his services. In respondent's brief in support of his latest motion, he acknowledges that the subsequent visits by the guerrillas were also an attempt to recruit him in order for him to assist the guerrillas in their attempt to violently overthrow the Guatemalan Government. It can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive.

Pet. App. 32a-33a. The BIA concluded that respondent "failed to show, by his new evidence, a *prima facie* eligibility for asylum or that the results of respondent's deportation hearing would be changed." *Id.* at 33a. Accordingly, it denied the motion to reopen. *Ibid.*

4. The Ninth Circuit reversed. Pet. App. 5a-25a. It found respondent eligible for asylum, based on the evidence presented to the immigration judge, on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion. *Id.* at 6a. At the same time, the court held that the letter from respondent's father did not require the BIA to reopen the deportation proceeding with respect to his withholding of deportation claim. *Ibid.*[1]

With respect to respondent's asylum claim, the court first noted that the record before the Immigration Judge included an advisory opinion from the State Department on the merits of respondent's application for relief. Pet. App. 7a. Although the letter advised that respondent was *not* a refugee, *ibid.*,

---

[1] An alien found eligible for withholding of deportation is entitled, without more, to that relief. An alien found eligible for asylum may still be denied that status in the discretion of the Attorney General. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987); *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

the court read it to support respondent's claim that "the guerrillas engage in forced recruitment." *Id.* at 8a. "Because nongovernmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution." *Id.* at 12a. "The persecution is properly categorized as 'on account of political opinion,'" according to the court, "because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Ibid.*

Turning to the facts of the case before it, the court of appeals found that respondent was eligible for asylum. Pet. App. 16a. "[I]n light of the guerrillas' practice of using force to recruit people, it certainly was reasonable for a person in [respondent's] situation to take the statements [to 'think it [over] well'] as threats." *Id.* at 17a. Furthermore, the court said, "the threat to [respondent] was for political as opposed to personal reasons." It explained: "[T]he Board did not suggest that the individual guerrillas who appeared at his door had a personal quarrel with [respondent], and in any event, there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [respondent] to further the *group*'s political goals. There was thus a reasonable possibility, based on the evidence presented [to the Immigration Judge], that the guerrillas would return and take [respondent] by force, thereby persecuting him on account of political opinion." *Id.* at 18a.

Although it concluded that the evidence showed that respondent was eligible for asylum, the court added that respondent's evidence "failed to prove the 'clear probability' of persecution necessary to obtain

withholding of deportation." Pet. App. 18a. It observed that the letter from respondent's father "did not cure the key deficiency in his withholding of deportation claim"—namely, the lack of specific evidence demonstrating that "forced recruitment was more than a reasonable possibility." *Id.* at 25a. Accordingly, the court upheld the BIA's denial of respondent's application for withholding of deportation, but remanded the case so that the BIA could exercise its discretion whether to grant respondent's asylum application. *Ibid.*[2]

SUMMARY OF ARGUMENT

The Refugee Act of 1980 authorizes the Attorney General to grant asylum only if he determines that an alien is unwilling to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

A. The language of the Refugee Act pertinent to this case requires the victim to hold a "political opinion" and to fear persecution because of that opinion. By referring to persecution "on account of" political opinion, Congress necessarily limited refugee status to those who hold political opinions. The state of mind of the persecutor is also an element, since "persecution" means the infliction of suffering on a person because of the victim's beliefs. Thus, the persecutor's state of mind is determinative of whether per-

---

[2] Before denying a petition for rehearing, Pet. App. 26a, the panel issued an order amending its opinion, *id.* at 2a-5a. The opinion reprinted in the Appendix, *id.* at 5a-25a, incorporates those amendments.

secution is "on account of" a political belief held by the victim.

The definitions of "refugee" in the international acts from which the Refugee Act's definition was taken—the 1946 Constitution of the International Refugee Organization, the 1951 United Nations Convention, and the 1967 United Nations Protocol—likewise require that persecution be "for reasons of," "based on," or "because of" the victim's race, beliefs, or nationality. Other legislative history of the Refugee Act confirms that it is necessary to focus both on the victim's characteristics or convictions and on the persecutor's intent to inflict harm on their account; indeed, Congress rejected a bill that would have extended asylum eligibility beyond refugees thus defined to include "dispaced persons." The BIA has interpreted the Refugee Act to require proof of the persecutor's intent to harm the applicant because of one of the five listed reasons, and has determined that forced recruitment by either a guerrilla organization or a government does not necessarily constitute persecution "on account of * * * political opinion." That construction is entitled to substantial deference.

B. A guerrilla group's conscription of soldiers is not necessarily (or even usually) motivated by an intent to discriminate against a person because of his political beliefs. It is true that forcible conscription by a guerrilla group has a political goal. It is also true that a person confronted with a credible threat of forcible conscription may have a well-founded fear of physical injury or worse if he does not go voluntarily. But those two facts, which, at best, are all that respondent established in this case, do not satisfy the statutory requirement that limits eligibility for asylum to persons with a "well-founded fear of persecution on account of * * * political opinion."

Contrary to the conclusion of the court of appeals, a threat made to achieve a political *objective* is simply not equivalent to persecution on account of political *opinion*. A person might be entirely sympathetic to the goals of the guerrillas, and share every one of their political beliefs, but not want to serve in their army. That person is faced with the same threat of forcible conscription as one who is entirely hostile to the guerrillas' program. Conversely, a person might share none of the guerrillas' views but be happy to sign for a decent wage. It should be obvious that neither of those persons has any fear of "persecution on account of * * * political opinion."

In his encounter with the guerrillas, respondent did not profess to have any political opinions, let alone to disagree with those espoused by the guerrillas. As concerns their behavior, "[i]t can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive." Pet. App. 32a-33a. To the contrary, the BIA specifically stated that the guerrillas sought to recruit respondent only so that he could assist them in their efforts to overthrow the Guatemalan government—"even offer[ing] to pay the respondent for his services." *Id.* at 32a. Since the guerrillas' threats were not made on account of his political opinions, respondent is not eligible for asylum under the Refugee Act.

ARGUMENT

A GUERRILLA ORGANIZATION'S ATTEMPT TO COERCE A PERSON INTO PERFORMING MILITARY SERVICE IS NOT NECESSARILY PERSECUTION "ON ACCOUNT OF * * * POLITICAL OPINION" WITHIN THE MEANING OF THE REFUGEE ACT

An applicant for asylum must establish four elements to be eligible for that relief: (1) that he is outside his country of nationality; (2) that he "is unable or unwilling" to return to and avail himself of the protection of that country; (3) that such inability or unwillingness is "because of persecution or a well-founded fear of persecution"; and (4) that such persecution is "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). As this case comes to this Court, only the fourth element remains at issue.

A. Persecution "On Account Of * * * Political Opinion" Means The Infliction Of Suffering Because Of The Victim's Political Beliefs

Asylum eligibility is limited to persons who reasonably fear persecution on account of the five reasons listed in the statute, including their political opinions. That proposition is apparent from (1) the language of the Refugee Act, (2) the international acts which supplied the definition of "refugee" in the Refugee Act, and (3) the legislative history of the Refugee Act.

1. In the absence of congressional definition or common law meaning, the phrase "persecution on account of * * * political opinion" in the Refugee Act "must be given [its] ordinary meaning." *Chapman* v. *United States*, No. 90-5744 (May 30, 1991),

slip op. 7; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (giving definition of "refugee" in Refugee Act its "ordinary and obvious meaning"). The ordinary meaning of "persecution," at the time Congress passed the Refugee Act in 1980, was the infliction of suffering because of the victim's race, beliefs, or nationality, especially religious beliefs. See 7 *The Oxford English Dictionary* 721 (1933) ("The action of persecuting or pursuing with enmity and malignity; *esp.* the infliction of death, torture, or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it."); *The Random House Dictionary of the English Language* 1074 (1966) ("[A] program or campaign to exterminate, drive way, or subjugate a people because of their religious, ethical, or moral beliefs or practices: *the persecutions of Christians by the Romans.*"); *Webster's Second New International Dictionary of the English Language* 1826 (1957) ("The act or practice of persecuting or an instance of such. Specif.: a[.] The infliction of sufferings or death on those adhering to a creed or mode of worship regarded as heretical or offensive; as, the *persecution* of the early Christians."). The "on account of" clause in Section 1101(a)(42)(A), which immediately follows the term "persecution," limits the reach of the Refugee Act to the five bases for persecution listed in the statute, one of which is the victim's "political opinion." See *The Random House Dictionary of the English Language*, *supra*, at 10 (defining "on account of" to mean "by reason of; because of"); *Webster's Second New International Dictionary*, *supra*, at 16 (defining "on account of" to mean "[f]or the sake of; by reason of; because of").

The court of appeals offered two interpretations of "persecution on account of * * * political opinion."

Pet. App. 12a. First, it construed that phrase to require an asylum applicant to "express[] a political opinion hostile to the persecutor." Second, it read that phrase to mean that "the persecutors' motive * * * is political." *Ibid.* As applied by the court of appeals neither interpretation (alone or together) respects the limiting language chosen by Congress.

The first proposition simply ignores the "on account of" clause. That clause requires persecution to be *because of* political opinion. The asylum applicant may "express[]" a political opinion, but if the persecutor's disagreement with that opinion did not in fact cause the persecution, then the persecution is not "on account of * * * political opinion." The applicant's political opinion is a necessary, but not a sufficient, condition of asylum eligibility.

The second proposition recognizes the causation required by the "on account of" language, but profoundly misunderstands the nature of "persecution." "Persecution" is the infliction (or threatened infliction) of suffering on a person because of *that person's* characteristics, not the persecutor's. It is irrelevant that the persecutor's motives are "political" in nature, or that the persecutor has "political goals," Pet. App. 18a; unless the persecutor intends to hurt the asylum applicant because of *the applicant's* political opinion, the applicant is not eligible for asylum.

2. The international agreements from which Congress drew the definition of "refugee" in the 1980 Refugee Act support the reading of "on account of * * * political opinion" as a limitation on asylum eligibility to those who are harmed or threatened with harm because of their political beliefs. The definition of "refugee" in the 1980 Refugee Act originated in the 1946 Constitution of the International Refugee Organization (IRO). See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 437 (1987). Responding to the persecution perpetrated by the fascist powers before and during World War II, the IRO defined as "refugees" those persons who were outside their native country and were "victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war"; "Spanish Republicans and other victims of the Falangist regime in Spain"; and "persons who were considered refugees before the second world war, for reasons of race, religion, nationality or political opinion." IRO Const., Annex 1, Pt. 1, § A1(a)-(c), 62 Stat. 3049. The IRO also defined as refugees persons "of Jewish origin or foreigners or stateless persons" who were returned to their native country by "enemy action" and became "victims of nazi persecution." IRO Const., Annex 1, Pt. 1, § A3, 62 Stat. 3049-3050. The IRO allowed refugees to decline to be repatriated to their native country if they had a "valid objection" such as "persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions." IRO Const., Annex 1, Pt. 1, § C1(a)(i), 62 Stat. 3050; see International Refugee Organization, *Manual for Eligibility Officers* No. 175, ch. IV, Annex 1, Pt. 1, § C19, at 24 (undated, circulated in 1950) ("Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to *his* religious or political convictions or to *his* race, he is afraid of discrimination, or persecution, on returning home." (emphasis added)).

The IRO definition of "refugee" was incorporated into the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. at 152, whose definition of "refugee" was in turn revised in the 1967 United Nations Protocol Relating to the Status of

Refugees, Jan. 31, 1967, 19 U.S.T. 6225, T.I.A.S. No. 6577, to apply to persons who became refugees after January 1, 1951. The United States acceded to the Protocol in 1968. 19 U.S.T. 6257. In 1980, Congress, in enacting the Refugee Act, conformed the definition of "refugee" in United States immigration law to that in the 1967 Protocol. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. at 437; S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980); S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979).

The 1946 Constitution of the IRO, the 1951 United Nations Convention, and the 1967 United Nations Protocol all require that persecution be "for reasons of," "based on," or "because of" the victim's race, beliefs, or nationality.[3] The drafters of these instruments had in mind the many victims of fascist racial and ideological persecution. "Refugees," as defined

[3] The definition of "refugee" in the French text of the 1951 Convention (which is "equally authentic" with the English text, 189 U.N.T.S. at 184), underscores that persecution of a person because of his beliefs is an essential element of refugee status. The French text defines "refugee" as any person

> Qui * * * craignant avec raison d'être persécutée du fait de *sa* race, de *sa* religion, de *sa* nationalité, de *son* appartenance à un certain groupe social ou de *ses* opinions politiques, se trouvre hors du pays dont elle a la nationalité et qui ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays.

Id. at 153 (emphasis added). The use of the possessive pronouns "son," "sa," and "ses," refers to the victim's race, religion, nationality, membership in a social group, and political opinions. *Cassell's French Dictionary* 687 (1962); see *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1489, 1493-1494 (1991) (directing treaty interpretation to "begin with the text" and approving use of French dictionaries in construing the authoritative French text of the Warsaw Convention).

by the examples in these instruments, were not unwilling conscripts or the victims of war's dislocation; they were instead those who were made to suffer for their race, their beliefs, or their nationality.

3. Testimony before Congress, and statements by its Members individually and through committees, establish unequivocally that the legislators understood the term "refugee" to include only those persons persecuted because of their race, beliefs, or nationality.[4]

What is more, Congress rejected a bill that would have extended asylum eligibility to "displaced persons" because Congress wanted to prevent expansion of "the numbers of refugees eligible to come to the United States." H.R. Rep. No. 608, 96th Cong., 1st

[4] See, *e.g.*, H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979) (defining "refugee" to include "political or religious dissidents" and "prisoners of conscience"); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 69 (1979) (statement of Richard Clark, Coordinator of Refugee Affairs) (using "because of" for "on account of"); *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 14 (1977) (statement of Rep. Eilberg) (using "based on" for "on account of"); *id.* at 36 (testimony of James Carlin, Deputy Coordinator for Human Rights and Humanitarian Affairs, U.S. Department of State) (using "because of" for "on account of"); *id.* at 39 (testimony of James Carlin, Deputy Coordinator for Human Rights and Humanitarian Affairs, U.S. Department of State) (introducing document issued by the United Nations High Commissioner for Refugees describing the 1967 Protocol as prohibiting "the refoulement or forcible return of a refugee to any territory where his life or freedom would be threatened on account of *his* race, religion, nationality, membership of a particular social group or political opinion" (emphasis added)).

Sess. 10 (1979). The court of appeals' reading of "on account of * * * political opinion" would have precisely the effect Congress sought to avoid.

As this Court has "observed before," "the purposes of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 111 S. Ct. 1138, 1147 (1991) (citing *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987)). Both Houses of Congress recognized that the customary definition of "refugee" included only those persons who had left their native land. S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979). Both also wanted to assist victims of persecution who could not leave their country, such as jailed dissidents and political prisoners. *Ibid.* But the Senate bill proposed to do so by extending asylum eligibility broadly to "any person who has been displaced by military or civil disturbance or uprooted because of arbitrary detention, and who is unable to return to his usual place of abode." S. 643, 96th Cong., 1st Sess. § 201(a) (1979); 125 Cong. Rec. 23,224-23,225 (1979); S. Rep. No. 256, *supra*, at 20.[5] The House of Representatives, in contrast, proposed to help "in such special circumstances as the President * * * may specify, any person who is within the country of such person's nationality * * * and who is persecuted * * *." H.R. 2816, 96th Cong., 1st Sess. § 201(a) (1979); H.R. Conf. Rep. No. 781, 96th

[5] The Senate Report explained that the expanded definition was intended to "accommodate political prisoners and detainees who need resettlement opportunities outside their country" and to "insure maximum flexibility in responding to the needs of the homeless who are of special concern to the United States. This flexibility is needed, for example, to handle such situations as the evacuation of Saigon." S. Rep. No. 256, *supra*, at 4.

Cong., 2d Sess. 2 (1980); S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 2 (1980). The conference committee adopted the House version and rejected the Senate's definition of "refugee," which would have included "displaced persons." See H.R. Conf. Rep. No. 781, *supra*, at 19.

The rejection of the Senate bill is significant. See *INS* v. *Cardoza-Fonseca*, 480 U.S. at 442-443 ("enactment of the House bill rather than the Senate bill" demonstrates that Congress rejected the approach of the Senate bill). It confirms that "on account of * * political opinion" requires the persecutor's disagreement with the victim's political beliefs to be the cause in fact of persecution, for two reasons. First, by refusing to extend asylum eligibility to "displaced persons," Congress rejected the idea that persons who flee 'military or civil disturbance," S. 643, 96th Cong., 1st Sess. § 201(a) (1979); 125 Cong. Rec. 23,224-23,225 (1979), are eligible for asylum. Such persons may genuinely fear random acts of violence, the arbitrary impositions of combatants, or worse;[6] but the grounds of their fear are not tied to the five listed in the Refugee Act.

Second, Congress's *reason* for denying asylum eligibility to "displaced persons" applies with equal (or

[6] Considerable testimony before Congress concerned persons who were not refugees under the customary definition because they had not left their country. Those persons included political prisoners, "displaced persons," and, as one commentator put it, citizens of a country whose government is "so arbitrary that one need not be a member of [a] particular race, religion, nationality, social group or subscribe to any defined political opinion in order to incur its wrath," such as Uganda under Idi Amin. *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 383 (1979).

greater) force to an interpretation of the "on account of * * * political opinion" language that expands the customary notion of "refugee." Although the Conference Committee report did not explain why it rejected the Senate's "displaced persons" bill, other legislative materials indicate that Congress was concerned about the number of persons who would qualify as refugees under the expanded definition. The House committee defended its definition on the ground that it would not "expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. * * * The Committee is of the opinion that the new definition does not create a new and expanded means of entry, but instead regularizes and formalizes the policies and the practices that have been followed in recent years." H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979). On the House floor, Congressman Fascell pointed out that the House definition would not "create the potential for long lines of refugee applicants at U.S. ports abroad." 125 Cong. Rec. 37,201 (1979); see Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 104-105 (requiring the President to inform Congress of, *inter alia*, the number of such persons, the cost of their resettlement, and "the anticipated social, economic, and demographic impact of their admission to the United States"), codified as Immigration and Nationality Act, § 207(e), 8 U.S.C. 1157(e).[7]

[7] The Senate apparently shared the concern of the House of Representatives that the refugee definition not be given an expansive reading. Senator Kennedy, the chief Senate sponsor of the bill, described the Senate definition as intended to "accommodate political prisoners and detainees." 125 Cong. Rec. 23,232 (1979). Senator Kennedy defended the "displaced persons" definition on the Senate floor: "Let me state now, in no uncertain terms, that this change in the legal definition of a refugee will not mean that an unlimited number of refugees can or will be admitted to the United States." *Ibid.* It appears that his colleagues were not persuaded.

The same concern that caused Congress to reject the Senate's "displaced persons" definition inheres in the court of appeals' reading of "persecution on account of * * * political opinion" in the statute Congress passed. The court of appeals reasoned that "persecution is properly categorized as 'on account of political opinion'" if the asylum applicant "express[es] a political opinion" and "the persecutors' motive * * * is political." Pet. App. 12a. But since the court of appeals inferred the expression of a political opinion by respondent because he would not join the guerrillas, the court of appeals' only limit on asylum eligibility is the requirement that the persecutors have a political "motive," or, as the court put it, that the persecutors sought "to further the *group*'s political goals." *Id.* at 18a. Substituting the persecutor's politics for the applicant's removes an essential limit on the definition of "refugee" under the Act. Since guerrilla groups by definition have political goals (overthrowing the incumbent government), any person they attempt to coerce into performing military service would have a "well-founded fear of persecution on account of * * * political opinion." That would "entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum." *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292, 1299 n.5 (11th Cir. 1990) (per curiam).

While that expansive result itself contradicts the legislative intent, the court of appeals' rationale goes

further. If forced recruitment by guerrillas is "on account of * * * political opinion," so, too, must military conscription by the government under the auspices of a draft. Of course "non-governmental groups lack legitimate authority to conscript persons into their armies." Pet. App. 12a. But asylum eligibility under the Refugee Act does not turn on whether persecution is legitimately authorized. Governments throughout history have ordered persecution in punctilious conformity with domestic law. No principled distinction can be drawn between persons recruited by guerrillas and persons conscripted by governments. Under the court of appeals' statutory interpretation, victims of guerrilla recruitment and draft dodgers alike are eligible for asylum.

In fact, the court of appeals' reading of the "on account of" clause opens asylum to anyone with a well-founded fear of physical harm at the hands of a political faction. Assume, for example, that guerrillas need food, uniforms, and money to feed, clothe, and pay their soldiers. Assume further that they extort what they need from townspeople, asking them to choose between "your money or your life." Since, according to the court of appeals, the guerrillas' political motives satisfy the "on account of * * * political opinion" requirement, the townspeople would be eligible for asylum. Thus, the court of appeals' reasoning would extend asylum eligibility far beyond the limit Congress imposed.[8]

---

[8] On the other side of the coin, the court of appeals' reasoning would bar asylum to the foraging guerrillas because "[t]he term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42). "Were we to hold

4. Even if it were fair ground for debate whether harm inflicted or threatened in order to achieve a political objective qualifies as "persecution on account of * * * political opinion"—and all the indicia of legislative intent foreclose that interpretation—the court of appeals should have limited its consideration to whether the BIA's interpretation of that phrase was based on a permissible construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The Eleventh Circuit explained in *Perlera-Escobar* that "[t]he meaning and scope of the phrase 'on account of . . . political opinion' is not defined by the Act, nor does it appear from the legislative history that Congress unambiguously expressed an intent that the term should be construed in a particular way." 894 F.2d at 1296. In such a situation, the court of appeals should defer to the BIA's interpretation of the statutory language as long as it is reasonable. See *INS* v. *Cardoza-Fonseca*, 480

---

that practices such as attacking military bases, destroying property, or forcible recruiting constitute persecution, members of armed opposition groups throughout the world would be barred from seeking haven in this country. As the concept of what constitutes persecution expands, the group which is barred from seeking haven in this country also expands, so that eventually all resistance fighters would be excluded from relief. We do not believe Congress intended to restrict asylum and withholding [of deportation] only to those who had taken no part in armed conflict." *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 816 (BIA 1988); see *Matter of Canas*, 19 I. & N. Dec. 697, 710 n.13 (BIA 1988); *Matter of Fuentes*, 19 I. & N. Dec. 658, 661-662 (BIA 1988). Compare Pet. App. 12a ("Because non-governmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution.").

U.S. at 448 (ambiguity in term like "well-founded fear" can only be given "concrete meaning" in case-by-case adjudication; in that process, "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program"); cf. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2676-2681 (1990); *Fort Stewart Schools* v. *FLRA*, 110 S. Ct. 2043, 2046 (1990); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990); *Massachusetts* v. *Morash*, 490 U.S. 107, 116-118 (1989); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844; *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972).

The BIA's conclusion that forcible recruitment is not necessarily "persecution on account of * * * political opinion" is reasonable, has been applied consistently, and merits deference. In *Matter of Acosta*, 19 I. & N. Dec. 211, 223 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), the BIA explained that " 'persecution' as used in section 101(a)(42)(A) [8 U.S.C. 1101(a)(42)(A)] clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome." According to the BIA, "the evidence must demonstrate that

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien."

Matter of Acosta, 19 I. & N. Dec. at 226; *Matter of Mogharrabi*, 19 I. & N. Dec. at 446.[9]

"[C]onduct undertaken to further the goals of one faction in a political controversy does not necessarily constitute persecution 'on account of political opinion' so as to qualify an alien as a 'refugee' within the meaning of the Act." *Matter of Acosta*, 19 I. & N. Dec. at 234. " '[P]ersecution on account of political opinion' refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of the persecution." *Id.* at 235. If "there are no facts showing that the guerrillas were aware of or sought to punish" the alien "for his political opinion," then "he does not come within this ground of persecution." *Ibid.*

"[F]orced recruitment by either the guerrillas or the government does not constitute fear of persecution 'on account of political opinion.' " *Perlera-Escobar*, 894 F.2d at 1297 (speaking approvingly of BIA's interpretation to that effect). "[H]arm which may result incidentally from behavior directed at another goal, the overthrow of a government or, alternatively, the defense of that government against

---

[9] The BIA's interpretation echoes that of the Office of the United Nations High Commissioner for Refugees, as stated in the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva Sept. 1979). Paragraph 80 states that the "political opinion" ground of persecution "presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant."

an opponent, is not persecution. * * * Thus, the drafting of youths as soldiers, the unofficial recruiting of soldiers by force, the disciplining of members of a rebel group, or the prosecution of draft dodgers are necessary means of achieving a political goal, but they are not forms of persecution directed at someone on account of one of the five categories enumerated in section 101(a)(42)(A) of the Act." *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (BIA 1988); see Pet. App. 32a; *Matter of Canas*, 19 I. & N. Dec. 697, 707 n.7 (BIA 1988) ("[T]he evidence in this case indicates that both the Salvadoran Army and the guerrillas have engaged in the indiscriminate, forcible recruitment of young males in El Salvador. Because of its indiscriminate nature, this forcible recruitment would appear to be a risk inherent in a civil war, rather than a risk of 'persecution.'"); *Matter of Vigil*, 19 I. & N. Dec. 572, 577 (BIA 1988) ("The evidence in the record supports the respondent's statement that the guerrillas forcefully recruit young Salvadoran males. The purpose of this recruitment, however, is to further the guerrillas' objective of overthrowing the Salvadoran Government; the intent of the recruitment is not the persecution of young Salvadoran males on account of one of the five grounds listed in the Act."); *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 513 (BIA 1988) ("The first encounter that the respondent had with the guerrillas was their forced recruitment of him. The respondent was kidnapped by the guerrillas. It does not appear that there were any elements of persecution in this encounter. The guerrillas did not approach him to harm him because they considered him to have characteristics the guerrillas found offensive or which they wished to overcome. The guerrillas wanted him to be a member of their

group, even if his help was not provided willingly, or at least not volunteered."), rev'd, 883 F.2d 788 (9th Cir. 1989).

B. The Guerrillas' Attempt To Coerce Respondent Into Performing Military Service Manifests Their Intent To Field An Army, Not Their Intent To Persecute Respondent On Account Of His Political Beliefs

1. A guerrilla group's forcible conscription in order to field a fighting force and further its political goal of overthrowing the incumbent government, see Pet. App. 12a, 18a, is not, by itself, "persecution on account of * * * political opinion." A guerrilla group may engage in forcible conscription to fill its need for soldiers without any intention to punish its levy for holding incorrect political opinions. That, in fact, is the typical case.[10]

One example is the situation described by the Eleventh Circuit in *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292. Perlera-Escobar was a deserter from a guerrilla force who feared punishment for his defection. *Id.* at 1294. The BIA concluded that Perlera-Escobar was not eligible for asylum because the punishment Perlera-Escobar feared was not "persecution on account of political opinion" since "there was no evidence that the guerrillas' motivations to harm him are other than the need to discipline and deter desertion by its members." *Id.* at 1295. The Eleventh Circuit found reasonable "[t]he BIA's determination that the need to discipline and silence deserters is not persecution on account of 'political opinion' within the meaning of the Act." 894 F.2d at 1298. The

[10] A guerrilla force that focused its recruiting efforts on government supporters would be unusual and short-lived.

court reasoned that "[a] finding of persecution requires some degree of intent on the part of the alleged persecutor to harm the applicant in order to overcome a belief of the applicant." *Ibid.*[11]

Since a guerrilla group may well seek to recruit young men in order to field a fighting force, not to persecute those men for their political opinions, the Ninth Circuit erred in suggesting that a threat to conscript must be presumed to be persecution on account of political opinion unless the INS presents evidence to the contrary. Such a presumption (or in-

---

[11] The Eleventh Circuit added:

> In the absence of any evidence that the guerrillas are interested in him for political reasons, the BIA inferred from the record that Escobar is nothing more than a deserter. The record makes it apparent that the guerrillas are a paramilitary organization exercising control and discipline over its members. *It is also apparent that the guerrillas often rely on coercion to recruit soldiers who would not otherwise join them.* From these facts the BIA inferred that in order to maintain order and promote loyalty from its members, the guerrillas must discipline deserters. Without such measures the guerrillas would perish when, as is inevitably the case, the spirit of its fighters wanes. In this respect the guerrillas are similar to any military organization that punishes deserters in order to maintain unity. Moreover, the guerrillas also have an interest in preventing Escobar from divulging their secrets to the government or government-backed groups. Even Escobar admits that the guerrillas are interested in him because of what he knows. *Simply, the guerrillas care not what Escobar thinks or believes; rather their interest in him stems from their need to preserve unity and order in their ranks and to ensure the secrecy of their operations.*

894 F.2d at 1298 (emphases added).

ference[12]) has no basis in fact. Moreover, Section 208(a) of the Act vests in the Attorney General the authority to establish an asylum procedure, 8 U.S.C. 1158(a), and the procedure he has established requires the alien to bear the burden of proving his eligibility for relief, 8 C.F.R. 208.13. See *Matter of Acosta*, 19 I. & N. Dec. at 234 ("Case law and regulations have always made it clear that it is the alien who bears the burden of proving that he would be subject to, or fears, persecution."). The Attorney General's refusal to recognize a presumption such as the one created by the court of appeals is plainly appropriate.

2. The guerrillas' attempt to recruit respondent represented an attempt to draft a soldier, not a threat to inflict harm on a political foe. The certified administrative record does not reveal that respondent has any political opinions at all, let alone a political opinion offensive to the guerrillas. Moreover, his narrative of the encounter, Br. in Opp. App. 4a-5a, does not reveal that he expressed any political opinion to the guerrillas.[13] For their part, "the guerrillas wanted the respondent to join them, and according to respondent's father, even offered to pay the respondent for his services." Pet. App. 32a. The BIA noted that respondent "acknowledges" that the guerrillas attempted to recruit him "in order for him to assist the guerrillas in their attempt to violently

---

[12] In response to the government's petition for rehearing, which questioned the panel's use of a presumption, Gov't Rehearing Pet. 7, the panel deleted the word "presumption" and substituted the word "inference." See Pet. App. 5a. Compare 908 F.2d at 1458, with Pet. App. 18a.

[13] In fact, respondent remained for more than two months at the place where he supposedly feared forcible recruitment, and when apprehended in the United States he claimed to have come here for economic reasons. C.R. at 71, 147.

overthrow the Guatemalan Government," and emphasized that "[i]t can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive." *Id.* at 32a-33a.

* * * * *

Of course, many acts by guerrilla groups—political assassinations, for example—constitute "persecution on account of * * * political opinion." And the potential target of such persecution could introduce his own testimony or other indirect evidence to satisfy the statutory requirements for asylum eligibility. But the purpose of the Refugee Act was not to extend asylum eligibility to all victims of coercion or terror, but only to those who were threatened with persecution for certain reasons. Refusal to serve in someone's army is not one of those reasons.

CONCLUSION

That part of the court of appeals' judgment holding respondent eligible for asylum should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

CHRISTOPHER J. WRIGHT
Acting Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

LAURI STEVEN FILPPU
ALICE M. KING
Attorneys

JUNE 1991

☆ U. S. GOVERNMENT PRINTING OFFICE, 1991 282061 20608

BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The Refugee Act of 1980 defines a "refugee" as a person who has "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1988). The question presented is whether a person who fled his native country after refusing for political reasons to join a guerrilla organization, who fears that he will suffer persecution on account of that refusal if he returns home, and whose fear of persecution is concededly well-founded, has established that he is a "refugee" within the meaning of the statute, or whether he must also adduce state of mind evidence proving that the persecutors' disagreement with his opinion would in fact be the cause of the persecution.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE GOVERNMENT'S INTERPRETATION OF THE REFUGEE DEFINITION IS CONTRARY TO CONGRESSIONAL INTENT	8
A. Elias-Zacarias' Fear of Persecution on Account of Political Opinion Is Well Founded	8
B. The Position Advanced by the Government Would Require Applicants To Sustain Impossible Burdens of Proof	12
II. THE GOVERNMENT'S INTERPRETATION OF THE STATUTORY LANGUAGE IS NOT ENTITLED TO DEFERENCE	20
A. The BIA Has Not Consistently Required Applicants To Prove the Specific Motivations of Their Persecutors	21
B. The BIA Has Inferred the "Political Opinion" Element Without State of Mind Proof in Cases Involving Forced Recruitment by Groups Other Than Legitimate Governments	22
III. IF THE COURT ENUNCIATES A NEW EVIDENTIARY STANDARD, THE CASE MUST BE REMANDED FOR FURTHER FACTUAL DEVELOPMENT	26
CONCLUSION	33

TABLE OF AUTHORITIES

CASES Page

Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979) 28
American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) 26
Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988) 4, 5, 28
Berkemer v. McCarty, 468 U.S. 420 (1984) 27-28
Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) 5, 10, 28
Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 27
Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir.), *aff'd*, 480 U.S. 421 (1987) 14
Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984) 11, 14
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 19
Church of Scientology of California v. IRS, 792 F.2d 153 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987) 27
Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515 (1945) 29
Edwards v. South Carolina, 372 U.S. 229 (1963) 10
FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 20
Federal Power Commission v. Texaco Inc., 417 U.S. 380 (1974) 27
Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785 (2d Cir.), *aff'd*, 328 U.S. 275 (1946) 27
Hillhouse v. Harris, 715 F.2d 428 (8th Cir. 1983) 28
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) ..... *passim*
INS v. Stevic, 467 U.S. 407 (1984) 16, 17, 20, 25
Ithaca College v. NLRB, 623 F.2d 224 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980) 28
Kovac v. INS, 407 F.2d 102 (9th Cir. 1969) 23, 32
Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989) 5, 28
Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975) 30
Morton v. Ruiz, 415 U.S. 199 (1974) 20
Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063 (7th Cir. 1988) 28

TABLE OF AUTHORITIES—Continued

Page

NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987) 28
Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 28
Sagermark v. INS, 767 F.2d 645 (9th Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986) 20
Saint Francis College v. Al-khazraji, 481 U.S. 604 (1987) 29
SEC v. Chenery Corp., 332 U.S. 194 (1947) 26
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 10
Spence v. Washington, 418 U.S. 405 (1974) 10
Stone v. Powell, 428 U.S. 465 (1976) 28
Texas v. Johnson, 491 U.S. 397 (1989) 10
Thornhill v. Alabama, 310 U.S. 88 (1940) 10
Tinker v. Des Moines School District, 393 U.S. 503 (1969) 10
United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) 20
Watt v. Alaska, 451 U.S. 259 (1981) 20
Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984) 11

STATUTES AND REGULATIONS

8 U.S.C. § 1101(a)(42)(A) (1988) ..... *passim*
8 U.S.C. § 1157 (1988) 17
8 U.S.C. § 1158(a) (1988) 17

LEGISLATIVE MATERIALS

H.R. Rep. No. 608, 96th Cong., 1st Sess. (1979) ..... *passim*
S. Rep. No. 256, 96th Cong., 1st Sess. (1979) 17-18, 26
S. Conf. Rep. No. 590, 96th Cong., 2d Sess. (1980) 14
126 Cong. Rec. 4499 (1980) (statement of Rep. Holtzman) 14, 18
126 Cong. Rec. 3756 (1980) (statement of Sen. Kennedy) 18
U.S. Department of State, *Country Reports on Human Rights Practices for 1983*, 98th Cong., 2d Sess. (Joint Comm. Print 1984) 13

TABLE OF AUTHORITIES—Continued

Page

U.S. Department of State, *Country Reports on Human Rights Practices for 1985*, 99th Cong., 2d Sess. (Joint Comm. Print 1986) 13
U.S. Department of State, *Country Reports on Human Rights Practices for 1986*, 100th Cong., 1st Sess. (Joint Comm. Print 1987) 13
U.S. Department of State, *Country Reports on Human Rights Practices for 1988*, 101st Cong., 1st Sess. (Joint Comm. Print 1989) 30
U.S. Department of State, *Country Reports on Human Rights Practices for 1989*, 101st Cong., 2d Sess. (Joint Comm. Print 1990) 30
U.S. Department of State, *Country Reports on Human Rights Practices for 1990*, 102d Cong., 1st Sess. (Joint Comm. Print 1991) 30

ADMINISTRATIVE DECISIONS

Matter of A.G., 19 I. & N. Dec. 502 (BIA 1987), *aff'd, M.A. v. U.S. INS*, 899 F.2d 304 (4th Cir. 1990) 19, 24
Matter of Ahmed, BIA unpublished dec. No. A24 798 181 (decided June 10, 1988) 7, 21
Matter of Anselmo, Int. Dec. 3105, 1989 BIA LEXIS 11 (BIA May 11, 1989) 29
Matter of Arghwan, BIA unpublished dec. No. A26 805 885 (decided Nov. 19, 1987) 24-25
Matter of Betanco-Rios, BIA unpublished dec. No. A28 635 394 (decided Mar. 31, 1988) 21
Matter of Bonnette, 17 I. & N. Dec. 587 (BIA 1980) 29
Matter of Bowe, 17 I. & N. Dec. 488 (BIA 1980, 1981) 29
Matter of Canas, 19 I. & N. Dec. 697 (BIA 1988), *rev'd*, 902 F.2d 717 (9th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3565 (U.S. Feb. 6, 1991) (No. 90-1246) 25
Matter of Cordova-Lima, BIA unpublished dec. No. A23 699 315 (decided Aug. 26, 1988) 29

TABLE OF AUTHORITIES—Continued

Page

Matter of Diaz-Morales, BIA unpublished dec. No. A24 854 030 (decided Aug. 14, 1987) 30
Matter of Exame, 18 I. & N. Dec. 303 (BIA 1982) 30
Matter of Fuentes, 19 I. & N. Dec. 658 (BIA 1988) 21
Matter of Galdamez-Ayala, BIA unpublished dec. No. A23 696 985 (decided June 9, 1988) 29
Matter of Gutierrez-Cano, BIA unpublished dec. No. A26 677 072 (decided Aug. 3, 1987) 22
Matter of Herrera, 18 I. & N. Dec. 4 (BIA 1981) 29
Matter of Izatula, Int. Dec. 3127, 1990 BIA LEXIS 2 (BIA Feb. 6, 1990) 19, 25
Matter of J-S, BIA unpublished dec. No. A27 091 255 (decided Aug. 3, 1989) 29
Matter of Kondo, 17 I. & N. Dec. 330 (BIA 1980) 29
Matter of Maldonado-Cruz, 19 I. & N. Dec. 509 (BIA 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989) 22, 25
Matter of McMullen, 17 I. & N. Dec. 542 (BIA 1980), *rev'd on other grounds*, 658 F.2d 1312 (9th Cir. 1981) 10
Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987) 14
Matter of Momen, BIA unpublished dec. No. A27 026 208 (decided Nov. 6, 1985) 24
Matter of Noory, BIA unpublished dec. No. A24 081 415 (decided Dec. 11, 1985) 24
Matter of Orellana-Marquez, BIA unpublished dec. No. A26 307 726 (decided Mar. 30, 1990) 29
Matter of Ortega-Moran, BIA unpublished dec. No. A24 348 263 (decided Apr. 9, 1990) 29
Matter of Patel, 17 I. & N. Dec. 597 (BIA 1980) 29
Matter of Ratnam, BIA unpublished dec. No. A28 532 774 (decided June 12, 1990) 29
Matter of Re, BIA unpublished dec. No. A29 773 836 (decided Dec. 28, 1990) 25
Matter of Rodriguez-Majano, 19 I. & N. Dec. 811 (BIA 1988) 22, 29-30

TABLE OF AUTHORITIES—Continued

Page

Matter of Said-Barre, BIA unpublished dec. No. A24 798 187 (decided Apr. 15, 1988) ..... *passim*
Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982) ..23, 24, 25
Matter of Vigil, 19 I. & N. Dec. 572 (BIA 1988) 22
Matter of Vohra, BIA unpublished dec. No. A27 504 113 (decided Feb. 25, 1988) 24

OTHER AUTHORITIES

T. Aleinikoff & D. Martin, *Immigration: Process and Policy* (int. 2d ed. 1991) 23
American Convention on Human Rights, O.A.S. Treaty Ser. No. 36 (OEA/Ser. L.L/V/II. 23 doc. 21 ver. 6 (1979)) 19
Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252 (1990) 23
Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981) 26
The Christian Science Monitor, July 9, 1991, at 1, col. 1 31
Conscientious Objection to Military Service, U.N. Doc. E/CN. 4/Sub. 2/1983/30/Rev. 1 (1985) 19
Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status*, 10 Brooklyn J. Int'l L. 333 (1984) 16
Foreign Broadcast Information Service, *Latin American/Daily Report*, Oct. 25, 1988 31
Helton, Immigration and Naturalization Service v. Stevic: *Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation*, 87 W. Va. L. Rev. 787 (1985) 11
Immigration and Naturalization Service, Office of the General Counsel, Asylum Branch, *Basic Law Manual: Asylum* (March 1991) 10, 28

TABLE OF AUTHORITIES—Continued

Page

International Refugee Organization, Constitution, G.A. Res. 62, U.N. Doc. A/1641 Add. 1 (1947) 15
International Refugee Organization, *Manual for Eligibility Officers* (1950) 15-16
N.Y. Times, Oct. 10, 1982, § A, at 2, col. 1 31
Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Sept. 1979) ..... *passim*
United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 152 ..... 15, 26
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 ..... *passim*
Webster's Ninth New Collegiate Dictionary (1988) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1342

IMMIGRATION & NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Jairo Jonathan Elias-Zacarias fled his native Guatemala in 1987 in fear of persecution by armed anti-government guerrillas who had tried to pressure him into joining them. He seeks recognition that he is a refugee within the statutory definition set forth in the Refugee Act of 1980. The United States government now concedes that Elias-Zacarias has a well-founded fear of persecution, but insists that he has failed to prove that such persecution would be "on account of . . . political opinion."

One evening in late January 1987, Elias-Zacarias' parents observed two masked men with machine guns lurking

in the semi-darkness outside their home in Olintepeque, Guatemala.[1] The armed men approached the house, identified themselves as members of the anti-government guerrillas, and attempted to pressure Elias-Zacarias and his family into joining their revolutionary movement. They insisted that "the guerrillas were good," but Elias-Zacarias and his family stated repeatedly that they did not want to join the guerrillas. The armed intruders left, stating that they would return and warning Elias-Zacarias' family to "think it [over] well." Opp. Cert. App. at 4a-7a.

Elias-Zacarias did not want to align himself against the legitimately constituted government of Guatemala—in his own words, to go "against the government," but he believed that the guerrillas would "take me and kill me" if he continued his refusal to join them when they returned. Opp. Cert. App. at 5a.[2] Therefore, following his parents' advice, he fled Guatemala in March 1987. On or about July 12, 1987, he entered the United States near Nogales, Arizona. Agents of the Immigration and Naturalization Service (INS) apprehended him the same day, placed him in detention, and commenced proceedings to deport him.

At the deportation hearing, the INS argued that Elias-Zacarias had failed to establish a "well-founded fear of persecution" because he and his family had not been threatened by the guerrillas and the guerrillas had not returned to his family's home. *Id.* at 13a. The immigration judge found Elias-Zacarias to be a credible witness and believed his testimony concerning his reasons for leaving Guatemala. She concluded, however, that he had not established that he qualified as a refugee. She suggested that he had not shown that his experience with the guerrillas was "any different from that experienced by other Guatemalans." Appendix to Petition for a Writ of Certiorari at 41a (hereinafter cited as "Pet. App."). Moreover, she found that, since there was (at that time) no evidence that the guerrillas had actually returned to his parents' home, Elias-Zacarias had "failed to show that if he is returned to Guatemala the guerrillas will seek him out." *Id.* at 42a.[3]

The Board of Immigration Appeals (BIA) dismissed Elias-Zacarias' appeal on procedural grounds. Elias-Zacarias moved to reopen, lodging with the BIA *inter alia* a letter from his father. The letter stated that the guerrillas had returned to the family's home on at least two occasions looking for Elias-Zacarias. The letter (addressed to Elias-Zacarias' attorney) went on to state:

> In spite of the fact that [the guerrillas] are looking for him and the truth is that my son does not know that they are looking for him here at the house, we have not told him anything about this in order that he not worry about us or think they can kill us and even though we would tell him about it we would not solve anything . . . .[4]

---

[1] Elias-Zacarias' uncontradicted testimony before the immigration judge is reprinted as an appendix to Respondent's Brief in Opposition to the Petition for Writ of Certiorari (hereinafter cited as "Opp. Cert. App.").

[2] At the deportation hearing, Elias-Zacarias' counsel asked him to testify further about what he thought would happen to him if the guerrillas returned and found him. Counsel for the INS objected to the question as speculative, and the immigration judge sustained the objection. Opp. Cert. App. at 6a.

[3] The immigration judge's only mention of the five statutory grounds for persecution occurred in the two sentences stating her legal conclusions that Elias-Zacarias had failed to prove that he was a refugee eligible for asylum or was entitled to withholding of deportation. Pet. App. at 41a-42a.

[4] Petitioner's Opening Brief at 11, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991) (citing Administrative Record 38). The court of appeals' decision did not rely on the letter from Elias-Zacarias' father; it found that the original record was sufficient to establish Elias-Zacarias' eligibility as a refugee.

The BIA denied Elias-Zacarias' motion to reopen but addressed the merits of his appeal. It stated that there was no evidence that Guatemalan guerrillas generally engaged in forced recruitment and (even considering the father's letter) that Elias-Zacarias had failed to establish an objective basis for his fears that the guerrillas would return and kidnap or kill him. The BIA concluded that Elias-Zacarias had shown only that he had been approached and asked to join the guerrillas—not that threats were directed towards him.[5]

Elias-Zacarias appealed to the United States Court of Appeals for the Ninth Circuit. Defending the BIA's decision, the government argued that the BIA had applied the Ninth Circuit's precedents and had found no threats by the guerrillas against Elias-Zacarias.[6] The court of appeals found that the BIA had erred in its conclusion that the Guatemalan guerrillas did not engage in forced recruitment. The panel determined that the State Department's advisory letter on Elias-Zacarias' application, taken together with Elias-Zacarias' application for asylum and hearing testimony, established that the Guatemalan guerrillas did engage in forced recruitment. Focusing on the exhortation to "think it [over] well" by

[5] Pet. App. at 32a-33a. The BIA did not address the question the government presents here: whether forced recruitment by a guerrilla army constitutes persecution "on account of political opinion." Rather than raise the "political opinion" issue, the BIA focused on the question whether there was a threat and sought to distinguish the decision in *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988), on the ground that "the alien there was actually threatened by the guerrillas for his refusal to join them." The BIA decision cited prior BIA cases involving guerrilla organizations in support of its conclusion that the attempt by the guerrillas to recruit Elias-Zacarias was not forcible. Pet. App. at 32a-33a.

[6] Brief for Respondent at 2, 11, 17, 28, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991).

men carrying machine guns and wearing masks,[7] the court of appeals also credited Elias-Zacarias' belief that the guerrillas had threatened him. Pet. App. at 16a.

Although the questions presented to the court of appeals did not address the "on account of political opinion" language at issue in this Court, the court of appeals reasoned that, in general, "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and . . . the persecutors' motive in carrying out the kidnapping is political." Pet. App. at 12a. The court relied on circuit precedents holding that forced recruitment by a guerrilla organization can provide a basis for persecution on account of political opinion. *See, e.g., Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Arteaga v. INS*, 836 F.2d 1227, 1232 n.8 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984). The court observed that the INS had not presented evidence of any non-political motive for the guerrillas' threats. Pet. App. at 18a. Applying the "well-founded fear" test adopted by this Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440-41 (1987), the panel then held unanimously that Elias-Zacarias had indeed established that he qualified as a refugee.

The government filed a petition for rehearing, arguing for the first time that forced recruitment by a guerrilla organization does not necessarily constitute persecution "on account of political opinion" and that Elias-Zacarias had the burden of proving his persecutors' state of mind.[8]

[7] The panel took note of the fact that, at oral argument, "the lawyer for the INS indulged in the wholly unwarranted speculation that the guerrillas wore handkerchiefs not to conceal their faces but 'because it might have been dusty that day.'" Pet. App. at 17a n.8.

[8] *Compare* Pet. App. at 13a (INS position at deportation hearing) *and* Brief for Respondent at 11, 17, 28, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991), *with* Respondent's Petition for Rehearing With Suggestion for Rehearing En Banc at 1, 4, 9, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991).

The panel denied the motion but amended its prior opinion in minor respects.[9]

SUMMARY OF ARGUMENT

This case is not about displaced persons fleeing from general conditions of civil strife in a war-torn country. This is a case about one individual—Jairo Jonathan Elias-Zacarias—who had a political opinion, who acted on it, and who fears that if he returns home he will be taken and killed because of his politically-motivated act. The immigration judge believed and the record establishes that Elias-Zacarias refused to join the guerrillas because he did not wish to align himself "against the government," and that he has a genuine fear of persecution because of his refusal. Giving the words of the statute their ordinary meaning, the record as a whole is sufficient to establish that Elias-Zacarias' fear of persecution on account of political opinion is well founded and thus that his case falls within the statutory definition of "refugee."

The government insists, however, that Elias-Zacarias has the burden of proving more than that he has a political opinion and a well-founded fear of persecution. The government asserts that the "typical case" of forced conscription by guerrillas does not involve persecution on account of political opinion, Petitioner's Brief at 27 (hereinafter cited as "Pet. Br."), even though the record contains absolutely no factual basis for such a presumption. To overcome this presumption, the government would require Elias-Zacarias to prove the state of mind of his persecutors—to prove that the persecution he fears would actually be motivated by the guerrillas' desire to punish him for his political opinions. This constricted reading

[9] The amended opinion elaborated on the meaning of the "reasonable possibility" standard for establishing a "well-founded fear of persecution," and substituted the word "inference" for "presumption" in its discussion of the guerrillas' motives. Pet. App. at 2a-5a; *see id.* at 18a.

of the statute would make it nearly impossible for applicants like Elias-Zacarias to qualify as refugees. Congress did not intend to impose such an unreasonable burden. As this Court held in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), the statute focuses on the state of mind of the refugee, requiring him only to show that *he fears* persecution by reason of one of the five enumerated grounds and that *his fear* is "well-founded." The Refugee Act of 1980 was intended to implement the 1967 U.N. Protocol, which does not require an applicant to adduce specific evidence of the subjective motivations of the persecutors he fears.

The government's position is flatly inconsistent with a number of prior decisions of the BIA. The BIA has held that "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible." *Matter of Said-Barre*, BIA unpublished dec. No. A24 798 187 (decided Apr. 15, 1988); *Matter of Ahmed*, BIA unpublished dec. No. A24 798 181 (decided June 10, 1988).[10] In a number of cases decided both before and after Elias-Zacarias' case, the BIA has held that forced recruitment into the Soviet-controlled Afghan army was "persecution on account of political opinion"—without any evidence about the subjective motives of the persecutors. If the BIA had followed these cases, it would have concluded that Elias-Zacarias is a refugee within the meaning of the statute. The agency's unexplained inconsistency deprives its interpretation of any claim to heightened judicial deference.

Finally, even if the Court were to accept the statutory interpretation the government now urges, it should not uphold the BIA's decision against Elias-Zacarias. The rationale of the BIA decision was that Elias-Zacarias had not shown a sufficient likelihood of persecution upon his return to Guatemala. The court of appeals rejected that

[10] Respondent has lodged with the Clerk of this Court copies of all of the unpublished BIA decisions cited in this brief.

rationale, and the government did not ask this Court to review that portion of the court of appeals' decision. The question the government does raise here—the interpretation of the phrase "well-founded fear of persecution on account of political opinion"—was not litigated before the immigration judge, the BIA, or the court of appeals prior to the rehearing stage. Elias-Zacarias has not had a fair opportunity to develop a factual record regarding the subjective motivations of his persecutors, or to demonstrate the unreasonableness of the burden of proof the government now seeks to impose on him. Accordingly, if this Court should adopt an interpretation which turns on proof of the persecutors' motives, it should remand the case with instructions to permit Elias-Zacarias to submit further evidence.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF THE REFUGEE DEFINITION IS CONTRARY TO CONGRESSIONAL INTENT.

A. Elias-Zacarias' Fear of Persecution on Account of Political Opinion Is Well Founded.

Elias-Zacarias fears that if he returns to Guatemala he will suffer persecution on account of his politically motivated refusal to join the guerrillas. The Refugee Act of 1980 defines "refugee" as one who is outside the country of his nationality and who is unable or unwilling to return "because of persecution or a well-founded fear of persecution on account of . . . political opinion." Elias-Zacarias submits that he fits within that definition and rests his claim, not only on what happened in Guatemala in 1987, but also on what he fears will happen to him if he returns home.[11] He relies on the "ordinary and ob-

[11] The very question presented in the government's brief thus starts everyone off on the wrong foot because it ignores the fear component of the question that is presented by the statute and by the facts.

vious meaning" of the statutory language. *Cardoza-Fonseca*, 480 U.S. at 431.

The government's central reason for opposing Elias-Zacarias' claim is that Elias-Zacarias did not adduce evidence of the state of mind of the persecutors he fears. The government argues that "[t]he persecutor's state of mind is determinative." Pet. Br. at 9. In its "ordinary and obvious" meaning, however, the definitional language of the Refugee Act of 1980 directs inquiry not to the persecutor's state of mind, but to the *applicant's* state of mind, and to the nature and basis of the applicant's subjective fear: Does the applicant fear persecution on account of his political opinion? If so, is that fear objectively reasonable?

The record of this case answers those questions in the affirmative. Elias-Zacarias' subjective fear of persecution is established by his unchallenged testimony that he feared that the guerrillas would retaliate against him for his refusal to join them—in his words, that they would "take me and kill me." Opp. Cert. App. at 5a. The immigration judge believed that testimony, as she believed Elias-Zacarias' testimony that he refused to join the guerrillas because he did not wish to align himself "against the government."[12] Elias-Zacarias did not refuse to join because he was afraid of gunfire, because he wished to stay in the village to protect his aged mother, or because he preferred his current employment. "By . . . refusing to join a particular political faction, [he]

[12] The government's fondness for dictionary definitions, Pet. Br. at 13, is selective. The assertion that "[t]he certified administrative record does not reveal that respondent has any political opinions at all, let alone a political opinion offensive to the guerrillas," Pet. Br. at 29, acknowledges neither this testimony nor *Webster's Ninth New Collegiate Dictionary* (1988), which defines "political" as meaning either "of or relating to government, a government, or the conduct of government," or "involving or charged or concerned with acts against a government or a political system." *Id.* at 910-11.

expressed his opinion and took a political stance. That conduct is as much an affirmative expression of a political opinion as is joining a side, or speaking out for or against a side." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287 (9th Cir. 1984).[13]

The immigration judge also credited Elias-Zacarias' uncontradicted testimony as to the objective facts that the guerrillas came to his home armed and wearing masks and that they left him with a warning to "think it [over] well." The government concedes that Elias-Zacarias has a well-founded fear of persecution. Pet. Br. at 12. The government also concedes, as it must, the well-settled proposition that a guerrilla organization can be the agent of persecution. *Id.* at 30.[14]

Elias-Zacarias "affirmatively express[ed] a political opinion" by refusing to join the guerillas; he was threatened; he believes he was threatened for his refusal to join; and he is afraid to return to Guatemala for fear that the threat will be carried out. The record shows that these fears have a reasonable basis. Nothing more is required by the statutory definition.

Elias-Zacarias could reasonably infer that the guerrillas consider his refusal to join them to be an act of

[13] In *Bolanos-Hernandez*, the Ninth Circuit cited a long line of this Court's cases holding that conduct can be an expression of political opinion. *See, e.g., Spence v. Washington*, 418 U.S. 405 (1974) (taping peace symbol on flag); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (civil rights march); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (arm band to protest Vietnam war); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (assembly in front of State House); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing). *See also Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).

[14] *See* Immigration and Naturalization Service, Office of the General Counsel, Asylum Branch, *Basic Law Manual: Asylum* 25 (Mar. 1991) (hereinafter *"INS Basic Law Manual"*); *Matter of McMullen*, 17 I. & N. Dec. 542 (BIA 1980), *rev'd on other grounds*, 658 F.2d 1312 (9th Cir. 1981).

political hostility and that they therefore consider him a political enemy. For Elias-Zacarias' fear to be objectively reasonable, there must only be a reasonable possibility that the persecution he fears would indeed be caused by his political opinion. *See Cardoza-Fonseca*, 480 U.S. at 440; *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984); *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984). He is not required to show that a political motivation is more likely than not.[15]

Indeed, once Elias-Zacarias presented evidence suggesting that the guerrillas had political motives for persecuting him, the government had the burden of offering evidence to the contrary. It did not undertake that burden here, let alone satisfy it: there is no indication in the record that the guerrillas who threatened Elias-Zacarias had any non-political motives for threatening him. *See Matter of Said-Barre*, BIA unpublished dec. No. A24 798 187, at 8 (decided Apr. 15, 1988) (applicant

[15] Under the Refugee Act of 1980, an applicant must show a "well-founded fear" that persecution was or would be on account of one of the five grounds; the Act does not require the applicant to establish that a particular ground was "more likely than not" the cause of persecution. *See* Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* 12-13, ¶ 42 (Sept. 1979) (hereinafter cited as "U.N. Handbook"), *quoted in Cardoza-Fonseca*, 480 U.S. at 439 ("the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there"). *See also* Helton, Immigration and Naturalization Service v. Stevic: *Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation*, 87 W. Va. L. Rev. 787, 800-808 (1985) (the "well-founded fear" standard requires only that the applicant's fear be genuine and reasonable under the circumstances).

Respondent has lodged a copy of the U.N. Handbook with the Clerk of the Court.

"does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor,'" especially when the government offers only "speculation" as to the persecutor's motives).

In summary, Elias-Zacarias had a political opinion and expressed it by refusing to join the guerrillas; he fears that he will suffer persecution because of that refusal to join if he returns home; and his fear of persecution is well founded. Only by assigning constricted, unintended meanings to the terms of the refugee definition and by adding unreasonable burdens of proof to the showing required of an applicant can one conclude that Elias-Zacarias has not demonstrated his "well-founded fear of persecution on account of . . . political opinion."

B. The Position Advanced by the Government Would Require Applicants To Sustain Impossible Burdens of Proof.

Evidence in the record amply demonstrates that Elias-Zacarias has a well-founded fear of persecution on account of political opinion. Yet, the government pronounces itself unpersuaded: "A guerrilla group may engage in forcible conscription to fill its need for soldiers without any intention to punish its levy for holding incorrect political opinions." Pet. Br. at 27. "That, in fact," declares the government, "is the typical case." *Id.*

Those assertions ignore the fact that the focus of the inquiry directed by the statute is on what Elias-Zacarias *fears*, not on the general nature of forced conscription. They also ignore the fact that what Elias-Zacarias fears most is not that he will be forced to join the guerrillas, but that he will be "take[n] and kill[ed]." Moreover, those knowing assertions of the government about how guerrillas behave (and why) have no basis in the record of this case. They are pure argument. And yet the government relies on such *ipse dixit* to demand that an applicant for asylum who has fled forced recruitment and retaliation by a guerrilla army must submit proof that his is not the assumed "typical case." To satisfy the government's standard, the applicant would be required to prove, not only his own political opinion, and not only that he has a subjective fear of persecution grounded in objective fact, but also exactly *why* his persecutors would act against him.

If this Court were to accept the government's position, it would be impossible, as a practical matter, for many if not most refugees ever to establish their eligibility for asylum, because they could not produce direct evidence of their persecutors' motives. For example, in Elias-Zacarias' situation, where would one begin? Whose motives should be proven, those of the two masked men carrying machine guns? or those of their officers? or those of the founders of the guerrilla movement? How could Elias-Zacarias—who did not know the names or addresses of his persecutors—obtain evidence of their subjective motivations? The answers to questions like these are particularly elusive because it is the very nature of guerrilla organizations (unlike governments) to leave little concrete evidence of their activities.[16]

Congress did not intend to compel applicants for asylum to meet impossible burdens of proof. In *Cardoza-Fonseca*, after examining the phrase "well-founded fear of persecution" in the refugee definition of the Refugee

---

[16] The State Department has noted the difficulty in determining a motive behind much of the violence in Guatemala, stating in one country report on human rights that, "although . . . deaths might have been politically motivated, (in many cases) there is no evidence which definitively links the deaths to the victim's political or professional activities." U.S. Department of State, *Country Reports on Human Rights Practices for 1985*, 99th Cong., 2d Sess. 544 (Joint Comm. Print 1986). *See also* U.S. Department of State, *Country Reports on Human Rights Practices for 1986*, 100th Cong., 1st Sess. 511 (Joint Comm. Print 1987); U.S. Department of State, *Country Reports on Human Rights Practices for 1983*, 98th Cong., 2d Sess. 580 (Joint Comm. Print 1984).

Act of 1980, the Court expressly rejected the government's proposition that an applicant for asylum was required to show that it was "more likely than not" that she would be persecuted on account of political opinion. The Court concluded that a less stringent reading of the definition was "more in keeping with Congress' intent." 480 U.S. at 445. Under this standard, "if documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to 'specific facts that give rise to an inference that the applicant has been or has good reason to fear that he or she will be singled out for persecution on one of the specified grounds.'" *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir.) (quoting *Carvajal-Munoz*, 743 F.2d at 574), *aff'd*, 480 U.S. 421 (1987).[17]

In addition, as the Court also recognized in *Cardoza-Fonseca*, "one of Congress' primary purposes was to bring United States refugee law into conformity with the 1967 United Nations Protocol Relating to the Status of Refugees."[18] The Protocol, as interpreted by authoritative international sources, establishes a reasonable burden of proof that takes account of the evidence-gathering difficulties faced by refugees who have fled their homelands in fear of persecution. According to the U.N. Handbook,[19] "it is hardly possible for a refugee to 'prove'

[17] The BIA itself has stated, "we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution . . . . The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

[18] 480 U.S. at 436, referring to United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. *See also* S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 18 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979); 126 Cong. Rec. 4500 (1980) (statement of Rep. Holtzman, co-sponsor of House bill).

[19] As this Court recognized in *Cardoza-Fonseca*, the U.N. Handbook is a source of "significant guidance" in interpreting the 1967

every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized."[20]

Thus, once it has been estabiished that the applicant genuinely fears persecution in response to an expression of his or her political beliefs, direct proof of the persecutors' subjective motivations is not required:

> While the [Protocol's] definition speaks of persecution "for reasons of political opinion" it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on "opinion". . . . It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.[21]

The IRO Constitution, G.A. Res. 62, U.N. Doc. A/1641 Add. 1 (1947), which is the precursor of the 1951 Convention Relating to the Status of Refugees and the 1967 U.N. Protocol, took a similar approach to the burden an applicant must bear. The IRO Manual for Eligibility Officers elaborated:

> [F]ear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to his religious or political convictions or

U.N. Protocol. The Handbook "has been widely considered useful in giving content to the obligations that the Protocol establishes." 480 U.S. at 439 n.22.

[20] U.N. Handbook, *supra* note 15, at 48, ¶ 203.

[21] *Id.* at 19-20, ¶ 81. *See id.* at 16, ¶ 61 and at 20, ¶ 83 (if an applicant faces persecution from his government for illegal departure or unauthorized stay abroad, "his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated [in the refugee definition]").

> to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling, the Eligibility Officer cannot refuse to consider the objection as valid when it is plausible.[22]

The record of this case fits these long-standing United Nations formulations exactly: Elias-Zacarias' political opinion led to his behavior, rendering it plausible that the guerrillas will retaliate against him because of his opinion.

Acceptance of the government's constricted interpretation would also contravene the intent of Congress in enacting the Refugee Act of 1980 to "insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law."[23] Congress adopted the statutory definition of "refugee" in 8 U.S.C. § 1101(a)(42)(A) (1988) with a broad, humanitarian purpose, expanding the category of eligible persons by eliminating geographical and ideological restrictions,[24] while developing other statutory

---

[22] International Refugee Organization, *Manual for Eligibility Officers* 24, ch. IV, para. 19 (1950). *See also* Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status*, 10 Brooklyn J. Int'l L. 333, 340 (1984).

[23] H.R. Rep. No. 608, *supra* note 18, at 17-18. Notably, the government's position is "inconsistent with the refugee definition." Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondent at 19. Under the UNHCR definition, "it is the fact of persecution, not any specific intent to persecute, that one reasonably fears, and from which the Refugee Act seeks to provide protection." *Id.*

[24] *See INS v. Stevic*, 467 U.S. 407, 422 (1984). On this point, the government's brief mischaracterizes the legislative history. *Compare*

mechanisms to control the number of refugees who could enter the United States. Notably, Congress adopted numerical limits for refugees located overseas who sought admission to this country, but chose not to impose any such limits on persons within the refugee definition who sought asylum at or within the borders of the United States.[25] As explained in part II.B *infra*, Congress intended the agency to apply the refugee definition in a geographically and ideologically neutral fashion, without regard to the potential number of applicants.[26]

Nor should the Court give weight to the government's focus on the "displaced persons" language in the Senate bill. Pet. Br. at 17-20. Congress' ultimate rejection of that language has no relevance to Elias-Zacarias' situation. The term "displaced persons" would have applied to persons who did not fall within the definition of refugee in the 1967 U.N. Protocol because they were located within their own countries and because they were the victims of generalized civil strife rather than targeted persecution.[27]

Pet. Br. at 17, 20 (Congress wanted to prevent expansion of "the numbers of refugees eligible to come to the United States" and believed that its definition of refugee would achieve this goal) *with* H.R. Rep. No. 608, *supra* note 18, at 10 ("The Committee carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group of refugees comes within the definition will not guarantee resettlement within the United States.").

[25] *Compare* 8 U.S.C. § 1157 (1988) *with id.* § 1158(a).

[26] Within the limits imposed by the statute, which are not at issue in this case, the Attorney General has the discretion to deny asylum to persons who qualify as "refugees" under the statutory definition. *See, e.g., INS v. Stevic*, 467 U.S. at 423 n.18.

[27] *See* S. Rep. No. 256, 96th Cong., 1st Sess. 20 (1979) ("person who ha[s] been displaced by military or civil disturbance or up-

In contrast, Elias-Zacarias is a refugee within the meaning of the 1967 U.N. Protocol because he is threatened with persecution and it is plausible that this persecution would be caused by his political opinion. Moreover, even though the Senate language was not adopted, the House language that was ultimately added to the statutory definition of refugee provides for admission of certain persons who would not qualify as refugees under the 1967 U.N. Protocol.[28] Thus, rather than showing that Congress intended a constricted interpretation of the refugee definition as a whole, the legislative history on this point shows that Congress was willing to extend the definition even beyond the requirements of the Protocol.

Petitioner further contends that persons fleeing forced recruitment by guerrillas should not be recognized as refugees because it would be logically necessary to provide the same treatment to persons seeking to avoid compulsory military service for their own governments. Pet. Br. at 22. This is a *non sequitur*. Persons in the latter category are not generally recognized as refugees, *see* U.N. Handbook, *supra* note 15, at 39-40, ¶ 167, because the international community recognizes the right of governments to require their own citizens to perform military service. However, guerrilla organizations have no legitimate claim of authority to conscript unwilling individuals into their armed forces.[29] In the absence of a

---

rooted because of arbitrary detention, and who is unable to return to his usual place of abode").

[28] 126 Cong. Rec. 4499-4500 (1980) (statement of Rep. Holtzman); 126 Cong. Rec. 3756-57 (1980) (statement of Sen. Kennedy).

[29] The petitioner acknowledges that, unlike governments, "'non-governmental groups lack legitimate authority to conscript persons into their armies.'" Pet. Br. at 22 (quoting Pet. App. at 12a), but claims that this is not a valid distinction because "[g]overnments throughout history have ordered persecution in punctilious conformity with domestic law." This argument is fallacious. Recognition that draft-dodgers are generally not refugees depends on the recognition under *international* law (not *domestic* law) of the right of governments to require their citizens to perform military service. *See* American Convention on Human Rights, art. 6, para. 3, O.A.S. Treaty Ser. No. 36 (OEA/Ser. L. L/V/II. 23 doc. 21 ver. 6 (1979)); *Conscientious Objection to Military Service*, U.N. Doc. E/CN.4/Sub. 2/1983/30/Rev. 1, at 5, 14 (1985).

The BIA itself has distinguished persecution by armies without a legitimate claim of authority from prosecution by a legitimate nation-state for draft dodging. *See Matter of A.G.*, 19 I. & N. Dec. 502 (BIA 1987), *aff'd*, *M.A. v. U.S. INS*, 899 F.2d 304 (4th Cir. 1990) (en banc); *Matter of Izatula*, Int. Dec. 3127, 1990 BIA LEXIS 2 (BIA Feb. 6, 1990).

legally recognized right of recruitment, non-governmental organizations engage in kidnapping, torture, extrajudicial killings, and other forms of coercion to achieve their ends. Thus, customary international law regarding governmental conscription sheds no light on Congress' intent with respect to persons fleeing forced recritment by guerrilla organizations.

In conclusion, the construction of the statute proposed by the government imposes a virtually impossible burden on applicants for asylum which is "contrary to clear congressional intent." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). In addition, even though Congress intended to conform the refugee definition to the 1967 U.N. Protocol, the government's narrow interpretation disregards the guiding principles in the U.N. Handbook. Finally, the policy reasons adduced by the government for excluding Elias-Zacarias from the statutory definition of refugee formed no part of the congressional purpose. The government's position is "manifestly contrary to the statute." *Id.* at 844.

II. THE GOVERNMENT'S INTERPRETATION OF THE STATUTORY LANGUAGE IS NOT ENTITLED TO DEFERENCE.

Petitioner urges deference to the BIA's interpretation of the refugee definition in the Refugee Act of 1980, citing several BIA decisions stating that forcible recruitment by guerrilla organizations does not constitute persecution on account of political opinion. But the factual premise for that argument—that the BIA's conclusion "has been applied consistently" [30]—is demonstrably incorrect.

In fact, the position urged by petitioner in this case is flatly inconsistent with a number of prior BIA decisions regarding the motivations of persecutors and the political implications of resisting forcible recruitment. If the BIA had applied the principles enunciated in its own rulings to Elias-Zacarias, it would necessarily have concluded that he is a refugee within the statutory definition. The BIA's inconsistent interpretation of the meaning of "persecution on account of political opinion" thus deprives it of the deference ordinarily given to agency determinations. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 446-47 n.30; *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 858-59 n.25 (1975); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).[31]

---

[30] Pet. Br. at 24.

[31] The government's inconsistent approach to forced recruitment cases cannot be justified as the agency's exercise of discretion in the area of its delegated policy-making authority. It is well established that, unlike the Attorney General's discretionary authority over the ultimate grant of asylum, the determination of refugee status does not involve the exercise of discretion by the agency. *See Sagermark v. INS*, 767 F.2d 645, 649 (9th Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). *See also Cardoza-Fonseca*, 480 U.S. at 428 n.5; *INS v. Stevic*, 467 U.S. at 423 n.18.

A. The BIA Has Not Consistently Required Applicants To Prove the Specific Motivations of Their Persecutors.

In two cases reversing denials of asylum to individuals from Somalia who claimed they were subject to persecution because of their membership in a particular social group, the BIA stated:

> We note that an applicant *does not bear the unreasonable burden of establishing the exact motivation of a "persecutor"* where different reasons for actions are possible. Rather, an applicant bears the burden of establishing facts from which a reasonable person would fear that the danger arises on account of race, religion, nationality, membership in a particular social group, or political opinion.

Matter of Said-Barre, BIA unpublished dec. No. A24 798 187 (decided Apr. 15, 1988) (emphasis added); *accord Matter of Ahmed*, BIA unpublished dec. No. A24 798 181 (decided June 10, 1988).[32] Application of this test is particularly appropriate in cases where, as in the instant case, the INS has presented no evidence regarding the persecutor's motives. *See Matter of Ahmed*, at 8.

The BIA has followed the "reasonable person" rule in other cases (not cited in the government's brief) and has not required applicants to bear the unreasonable burden of establishing the precise motives of the alleged persecutors. For example, in *Matter of Betanco-Rios*, BIA unpublished dec. No. A28 635 394, at 3 (decided Mar. 31, 1988), the BIA took into account the nature of the threats against the refugee's family if he did not enlist in the Sandinista army and the actions taken by the Sandinistas after he deserted. It held that "a person in the respondent's position would reasonably conclude that these actions arose because of his political opinion and

---

[32] The BIA has also stated this general rule in a published decision which nevertheless rejected the applicant's claim. *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988).

those of his family, rather than as 'simple' punishment for civilian or military offenses." *Id.* Similarly, in *Matter of Gutierrez-Cano*, BIA unpublished dec. No. A26 677 072, at 4 (decided Aug. 3, 1987), the BIA relied on a variety of factors, including the individual's own previous political activities, his refusal "because of his political views" to join a pro-Sandinista organization, and persecution of his family members, in order to find that "a reasonable person in the respondent's position would fear persecution in Nicaragua" *either* for membership in a social group or for anti-Sandinista political opinion.

In the cases on which the government relies here, however, the BIA has used a strikingly different approach. These cases would require applicants to meet a standard much more stringent than the "reasonable person" standard. The BIA has not explained, and the government's brief has not even acknowledged, the obvious inconsistency.

B. The BIA Has Inferred the "Political Opinion" Element Without State of Mind Proof in Cases Involving Forced Recruitment by Groups Other Than Legitimate Governments.

The government's position is also markedly inconsistent with a number of cases decided during the 1980s—both before and after Elias-Zacarias' BIA appeal—in which the BIA held that forced military recruitment was "persecution on account of political opinion." The government's claim of consistency is based on statements in several BIA decisions regarding forced recruitment by guerrillas,[33] but these cases cannot be reconciled with contemporaneously decided BIA cases that are not cited in the government's brief.

---

[33] *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (BIA 1988); *Matter of Vigil*, 19 I. & N. Dec. 572, 577 (BIA 1988); *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 513 (BIA 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989).

In *Matter of Salim*, 18 I. & N. Dec. 311 (BIA 1982), the first and most important of these cases—one of the few asylum cases published by the BIA as a precedent[34]—the Board held that an Afghani who refused to fight against his compatriots had established, on those grounds alone, a well-founded fear of persecution based on political opinion. The applicant's "immediate reason" for fleeing Afghanistan was his refusal to join the Soviet-controlled Afgan army that was battling the Mujahidin resistance movement for control of the country. Reversing the Immigration Judge, the BIA explained:

> The [State Department's 1981 country report on human rights in Afghanistan] emphasizes that due to mass desertion by Afghan soldiers who refuse to fight under Soviet command against their compatriots, the army resorts to dragooning and forcibly impressing into its forces men and boys as replacements. This clearly differs from persecution claims by aliens who merely seek to avoid military service in their country. *See Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969). . . . Consequently, we conclude that the applicant has established a well-founded fear of persecution despite the immigration judge's conclusion to the contrary.[35]

Salim did not adduce specific proof that the Soviet-controlled Afghan army sought to "punish" him "for holding incorrect political opinions." *Cf.* Pet. Br. at 27. Indeed, the State Department report cited by the BIA made it clear that the Afghan army was only engaging in forcible conscription to fill its need for soldiers. Yet, the BIA had no difficulty recognizing Salim as a refugee

---

[34] *See* T. Aleinikoff & D. Martin, *Immigration: Process and Policy* 112 n.12 (int. 2d ed. 1991); Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252, 255 & n.8 (1990).

[35] 18 I. & N. Dec. at 313.

who had fled persecution on account of political opinion. The BIA routinely applied its holding in *Matter of Salim* to cases involving Afghanis who had fled their country to avoid serving in the military before the Soviet withdrawal from Afghanistan.[36]

The BIA has reaffirmed on several occasions that its holding in *Matter of Salim* was based on the applicant's refusal to serve in an army other than the legitimate military service of his own country, not on any evidence of that army's specific intent to punish the applicant for his political opinions. For example, in *Matter of A.G.*, the BIA wrote:

> [T]he government of El Salvador has the same right as other governments to require military service and to enforce that requirement with reasonable penalties. The case of the claimant in *Matter of Salim* . . . is distinguishable from that of the respondent because the former was refusing to serve, not in an army controlled by his own government, but in one which was "under Soviet command." [37]

Similarly, in *Matter of Arghwan*, the BIA reiterated that: "The fact that the Afghan government is controlled by a foreign power distinguishes the applicant's persecution claim from persecution claims by aliens who

---

[36] *See, e.g., Matter of Vohra*, BIA unpublished dec. No. A27 504 113 (decided Feb. 25, 1988) (granting asylum to applicant who "appears to have fled Afghanistan because he did not want to be conscripted by the Afghan military and because he did not want to fight against the mujahedin"); *Matter of Noory*, BIA unpublished dec. No. A24 081 415 (decided Dec. 11, 1985) (granting asylum to applicant whose "only fear upon his return to Afghanistan is that he would have to serve in the Soviet-controlled military forces"); *Matter of Momen*, BIA unpublished dec. No. A27 026 208 (decided Nov. 6, 1985) (granting withholding of deportation "based solely on the applicant's assertion that he will be conscripted into the Afghan Army if returned to that country").

[37] 19 I. & N. Dec. at 507 (citation omitted).

merely seek to avoid military service in their country." [38] Like the Soviet-controlled army in Afghanistan, the Guatemalan guerrillas have no legitimate basis for compelling individuals to serve their cause.[39]

The BIA has never explained why its Guatemalan and Salvadoran decisions do not apply the same reasoning and reach the same results as the prior and contemporaneous Afghan decisions.[40] To the extent that the difference is based on geography or nationality, the inconsistency contravenes congressional intent. As this Court has recognized, one of Congress' primary purposes when it enacted the statutory definition of "refugee" in 1980 was to eliminate the geographical and ideological distinctions that had existed under prior law. *See INS v. Stevic*, 467 U.S. at 422. Testimony at hearings, floor statements, committee reports, the conference report, and the Presi-

---

[38] *Matter of Arghwan*, BIA unpublished dec. No. A26 805 885, at 4 (decided Nov. 19, 1987). *Accord Matter of Re*, BIA unpublished dec. No. A29 773 836 (decided Dec. 28, 1990).

[39] The BIA also has taken inconsistent approaches with respect to its "presumption" that there is a legitimate basis for punishing those who refuse to serve in forces other than those mustered by their own government. *Compare Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 517 (BIA 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989) (the right of the Salvadoran guerrillas to engage in forced conscription is "virtually identical" to the Salvadoran army's "right to establish rules of military conduct and to punish those who violate them") *with Matter of Izatula*, Int. Dec. 3127, 1990 BIA LEXIS 2 (BIA Feb. 6, 1990) (applicant had established a well-founded fear of persecution "because there [was] no basis in the record to conclude that any punishment imposed by the Soviet-controlled Afghan government would be a legitimate exercise of sovereign authority").

[40] In *Matter of Canas*, 19 I. & N. Dec. 697, 709 n.11 (BIA 1988), *rev'd*, 902 F.2d 717 (9th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3565 (U.S. Feb. 6, 1991) (No. 90-1246), the BIA distinguishes *Matter of Salim*. But, unlike Salim or Elias-Zacarias, Canas was objecting to military service for his own government. *Id.* at 709 n.11.

dent's signing statement all stressed the importance of a nondiscriminatory refugee policy.[41] Congress also intended to conform U.S. law to the requirements of the 1967 U.N. Protocol, which incorporates the provision in the 1951 U.N. Convention that requires signatories to "apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." [42]

III. IF THE COURT ENUNCIATES A NEW EVIDENTIARY STANDARD, THE CASE MUST BE REMANDED FOR FURTHER FACTUAL DEVELOPMENT.

For the reasons discussed above, this Court should reject the statutory interpretation advanced by the government and affirm the judgment of the court of appeals. But even if the Court adopts the government's position regarding the definition of "refugee," it cannot properly sustain the BIA's determination in this case. Instead, the case should be remanded to the court of appeals with instructions to remand to the agency for further development of the record.

One of the cardinal principles of administrative law is that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency*." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (emphasis

[41] *See, e.g.*, S. Rep. No. 256, *supra* note 27, at 4; H.R. Rep. No. 608, *supra* note 8, at 1, 9; *see generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 46, 50, 56, 60 (1981). *See also* Stipulated Settlement Agreement, *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (INS stipulation that its regulations do not permit ideological and geographical distinctions with respect to asylum applicants).

[42] United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. III, 189 U.N.T.S. 152.

added). Thus, an agency's order "must be upheld, if at all, 'on the same basis articulated in the order by the agency itself' "—not on a basis subsequently asserted by counsel during the process of judicial review. *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962)).[43]

In this case the decisions by both the immigration judge and the BIA rested on the conclusion that Elias-Zacarias had failed to show that he had been threatened with harm. It was on that basis that the agency argued the case at the deportation hearing and, in the first instance, before the court of appeals.[44] The court of appeals held that the BIA's factual findings on the lack of a threat by the guerrillas were not supported by substantial evidence. Pet. App. at 8a, 16a-17a. Petitioner chose not to seek certiorari on that holding, and indeed the government now concedes that the issue of whether Elias-Zacarias has a "well-founded fear of persecution" is not before this Court. Pet. Br. at 12. Therefore, the BIA's decision cannot be upheld on the basis articulated by the agency.[45]

[43] *See also Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 162-63 n.4 (D.C. Cir. 1986) (en banc) (Scalia, J.) (deference is not due to counsel's litigation position because agency has not taken a "clear and consistent" view), *cert. denied*, 479 U.S. 1063 (1987); *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 789-90 (2d Cir.) (Learned Hand, J.) (refusing to give deference to counsel's litigation position on grounds of agency inconsistency), *aff'd*, 328 U.S. 275 (1946).

[44] *Compare* Pet. App. at 13a (INS position at deportation hearing) *and* Brief for Respondent at 11, 17, 28, *with* Respondent's Petition for Rehearing With Suggestion for Rehearing En Banc at 1, 4, 9, *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990) (No. 89-7507), *cert. granted*, 111 S. Ct. 2008 (1991).

[45] Sup. Ct. Rule 24.1(a). In this case, there are no exceptional circumstances that would warrant this Court's consideration of an issue not presented on certiorari. *See Berkemer v. McCarty*, 468

Nor would it be appropriate for this Court to sustain the agency's decision based on the government's interpretation of "persecution on account of . . . political opinion" without giving Elias-Zacarias a further opportunity to develop the factual record. In presenting his case to the immigration judge and the BIA, Elias-Zacarias reasonably relied on Ninth Circuit precedents. Under those cases, he was not required to prove the motivations of his persecutors.[46] An administrative agency is obligated to apply circuit court precedent in any case that originates within that circuit or is otherwise within the circuit's jurisdiction.[47] The BIA's own case law recognizes its obligation to follow controlling circuit precedent, even if the BIA disagrees with the court's position on the merits. In fact, the BIA has frequently done so in recent

U.S. 420, 443 n.38 (1984); *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976).

[46] *See, e.g., Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Arteaga v. INS*, 836 F.2d 1227, 1232 n.8 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984).

[47] *See, e.g., NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). The INS' own manual for asylum adjudication requires immigration judges "to follow the precedent decisions of the courts of appeals only with respect to cases arising within the issuing court's territorial jurisdiction." *INS Basic Law Manual, supra* note 14, at 9.

The sole exception to this rule is when the agency has a "good faith" intention to appeal the circuit court's ruling to the Supreme Court, and expressly rejects the circuit court's controverted decision within the context of the agency decision. *See NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d at 75; *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1067 (7th Cir. 1988). The BIA decision does not reveal that it was taking advantage of this exception in this case. *See* Pet. App. at 27a-33a.

cases in the Ninth Circuit,[48] including cases involving forced recruitment by Central American guerrillas decided both before and after Elias-Zacarias' BIA appeal.[49] Under the circumstances, a remand for further fact-finding would be in keeping with this Court's established practice in cases in which it adopts a new interpretation of a statute. *See, e.g., Saint Francis College v. Al-khazraji*, 481 U.S. 604, 607 (1987); *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 534 (1945).[50]

On remand, Elias-Zacarias would submit evidence that the Guatemalan guerrillas kill people in retaliation for their refusal to join the guerrilla movement. In this regard, the State Department's country reports on human rights and newspaper articles have documented that the Guatemalan guerrillas forcibly recruit rural villagers and use extreme violence against those who oppose their revolutionary movement.[51]

[48] *See, e.g., Matter of Ratnam*, BIA unpublished dec. No. A28 532 774 (decided June 12, 1990); *Matter of Ortega-Moran*, BIA unpublished dec. No. A24 348 263 (decided Apr. 9, 1990); *Matter of J-S*, BIA unpublished dec. No. A27 091 255 (decided Aug. 3, 1989); *Matter of Anselmo*, Int. Dec. 3105, 1989 BIA LEXIS 11 (BIA May 11, 1989); *Matter of Herrera*, 18 I. & N. Dec. 4 (BIA 1981); *Matter of Bowe*, 17 I. & N. Dec. 488, 489-90 (BIA 1980, 1981); *Matter of Patel*, 17 I. & N. Dec. 597, 600-01 (BIA 1980); *Matter of Bonnette*, 17 I. & N. Dec. 587, 588 (BIA 1980); *Matter of Kondo*, 17 I. & N. Dec. 330 (BIA 1980).

[49] *See Matter of Orellana-Marquez*, BIA unpublished dec. No. A26 307 726 (decided Mar. 30, 1990); *Matter of Galdamez-Ayala*, BIA unpublished dec. No. A23 696 985 (decided June 9, 1988); *cf. Matter of Cordova-Lima*, BIA unpublished dec. No. A23 699 315 (decided Aug. 26, 1988) (deserter from guerrillas).

[50] A remand would also create a fully developed record on which to evaluate the reasonableness of the burden of proof the government seeks to allocate to applicants like Elias-Zacarias.

[51] The BIA regularly admits into evidence newspaper articles, documentary testimony of human rights groups, and State Department reports when assessing claims of well-founded fear of persecution on

In the Country Reports on Human Rights Practices for 1988, the State Department reported that leftist guerrillas in Guatemala "known to be looking for recruits" were allegedly responsible for the disappearance of eight men.[52] Similarly, in a report released in February 1990, the State Department wrote, *inter alia*: "[In 1989,] the communist guerrillas increased their campaign of violence, which included destruction of public and private property, robbery, *forced recruitment and labor*, murder, and indiscriminate use of land mines."[53] Two Guatemalan refugees repatriated from the United States were among the victims of extrajudicial killings in rural areas.[54] Last year's State Department report also states that forced recruitment and violence continue in Guatemala.[55]

---

account of political opinion. *See e.g., Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 812-13 (BIA 1988) (Board admits into evidence newspaper articles, congressional testimony, and reports by human rights groups); *Matter of Said-Barre*, BIA unpublished dec. No. A24 798 187 (decided Apr. 15, 1988) (BIA admits Amnesty International materials, State Department country reports, and newspaper articles); *Matter of Exame*, 18 I. & N. Dec. 303, 304-05 (BIA 1982) (BIA finds that immigration judge improperly excluded reports by human rights groups and State Department country reports); *Matter of Diaz-Morales*, BIA unpublished dec. No. A24 854 030 (decided Aug. 14, 1987) (Board admits into evidence newspaper articles, congressional testimony, reports by human rights groups, and expert affidavits). *See also Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975) (within the Ninth Circuit, the test for admissibility of hearsay evidence in administrative proceedings is "fundamental fairness and probativeness").

[52] *See* U.S. Department of State, *Country Reports on Human Rights Practices for 1988*, 101st Cong., 1st Sess. 579 (Joint Comm. Print 1989).

[53] U.S. Department of State, *Country Reports on Human Rights Practices for 1989*, 101st Cong., 2d Sess. 597 (Joint Comm. Print 1990) (emphasis added).

[54] *Id.* at 599.

[55] *See* U.S. Department of State, *Country Reports on Human Rights Practices for 1990*, 102d Cong., 1st Sess. 632 (Joint Comm. Print 1991).

Newspaper reports on conditions in Guatemala confirm that the guerrillas will use drastic measures against individuals, like Elias-Zacarias and his family, whom they perceive to be their political enemies. As early as 1982, an American missionary reported that forced recruitment by the guerrillas was causing peasants to flee the Guatemalan highlands, and that the guerrillas had killed a peasant who refused to join them.[56] In 1988, the guerrillas abducted 40 peasants in the Chimaltenango Department as part of a recruitment campaign.[57] Finally, on July 9, 1991, the Christian Science Monitor reported that, during the last six months, 587 people have been killed and 118 have disappeared in Guatemala.[58] Most observers blame this political violence on the leftist guerrillas, who are said to have accelerated their violence against their opponents in an effort to obtain negotiating leverage in the ongoing peace talks.[59]

Other evidence could be presented to the immigration judge on remand. Counsel for Elias-Zacarias has located tape recordings of interviews with an Indian from rural Guatemala, two former guerrillas, and an Indian administrator.[60] Therein, one rural villager recounted: "[The guerrillas] said, that . . . if we don't want to participate with them, then they will kill us. That is why we decided to leave one-by-one and give ourselves up to the Army."[61] A former guerrilla pro-

---

[56] *See* N.Y. Times, Oct. 10, 1982, § A, at 1, col. 1.

[57] Foreign Broadcast Information Service, *Latin American/Daily Report*, Oct. 25, 1988, at 19.

[58] The Christian Science Monitor, July 9, 1991, at 1, col. 1.

[59] *Id.*

[60] These interviews were conducted in 1982 by Louis S. Segesvary, a former Visiting Foreign Affairs Fellow at the Georgetown Center for Strategic and International Affairs.

[61] Interivew with inhabitant of Playa Grande, at 3.

vided a similar description of the recruitment process: "[the guerrillas] say that those who do not want to collaborate (with the guerrillas) are obviously with the Army and they kill him." [62] Expert testimony also could be presented detailing conditions in Guatemala, the recruitment practices of the guerrillas, and their motivations for taking reprisals against those who refuse to join. Finally, Elias-Zacarias could testify as to his personal knowledge of the guerrillas' recruitment practices, crucial testimony that was cut off by the immigration judge at Elias-Zacarias' original hearing on the grounds that it was speculative.[63]

Accordingly, if this Court enunciates a new rule regarding persecution on account of political opinion, it should afford Elias-Zacarias an opportunity to present such evidence to an immigration judge in order to sustain his claim under that newly-articulated standard. *See Kovac v. INS*, 407 F.2d 102, 107-108 (9th Cir. 1969).

---

[62] Interview with "Commander Anita," Female Ex-Guerrilla, at 3-4. Another guerrilla confirmed that villagers who chose not to collaborate with the guerrillas would be killed. Interview with Captured Male Guerrilla, at 2.

[63] *See* Opp. Cert. App. at 6a.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed or, alternatively, the case should be remanded with instructions that Elias-Zacarias be permitted to submit additional evidence that he has a "well-founded fear of persecution on account . . . of political opinion."

Respectfully submitted,

JAMES ROBERTSON
CAROL F. LEE
PETER A. VON MEHREN *
NANCY MANZER
WILMER, CUTLER & PICKERING **
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Respondent

August 14, 1991

* Counsel of Record

** Megan Hills, Robert Katz, Beate Ort, and Joan Silverstein, summer associates at the law firm of Wilmer, Cutler & Pickering, assisted in the preparation of this brief.

FOR ARGUMENT

Supreme Court, U.S.
FILED
SEP 13 1991
OFFICE OF THE CLERK

No. 90-1342

In the Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Atibo v. *Immigration Officer, London (Heathrow) Airport*, Imm. A.R. 93 (1978) 8
Canas-Segovia v. *INS*, 902 F.2d 717 (9th Cir. 1990), petition for cert. pending, No. 90-1246.... 7, 20
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 18
Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) 5
Desir v. *Ilchert*, 840 F.2d 723 (9th Cir. 1988).... 19
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)..3, 4, 14, 18
Kovac v. *INS*, 407 F.2d 102 (9th Cir. 1969)..... 19-20
Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).. 4
Matter of Canas, 19 I. & N. Dec. 697 (BIA 1988).. 7
Matter of Diaz, 10 I. & N. Dec. 199 (BIA 1963).... 12
Matter of Diaz-Morales, No. A24 584 030 (BIA Aug. 14, 1987) 16
Matter of Gutierrez-Cano, No. A26 677 072 (BIA Aug. 3, 1987) 16
Matter of Izatula, Int. Dec. No. 3127 (BIA Feb. 6, 1990) 18
Matter of Maldonado-Cruz, 19 I. & N. Dec. 509 (BIA 1988) 4, 11, 16, 19
Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987) 4, 15
Matter of Pierre, 15 I. & N. Dec. 461 (BIA 1975).. 12
Matter of Re, No. A 29 773 836 (BIA Dec. 28, 1990) 16
Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982).. 17, 18
Matter of Sanchez and Escobar, 19 I. & N. Dec. 276 (BIA 1985) 15
Matter of Vigil, 19 I. & N. Dec. 572 (BIA 1988).... 16
Matter of Villalta, Int. Dec. 3126 (BIA 1990)..... 15
Members of City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 5
Mendoza Perez v. *INS*, 902 F.2d 760 (9th Cir. 1990) 12, 19
Musial v. *Minister of Employment and Immigration*, 1 F.C. 290 (Fed. Ct. Can. 1981) 5, 6, 7

Cases—Continued: Page

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 (1979) 3
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 19
Sanchez-Trujillo v. *INS*, 801 F.2d 1571 (9th Cir. 1986) 14
United States v. *O'Brien*, 391 U.S. 367 (1968) 4
Wayte v. *United States*, 470 U.S. 598 (1985) 3, 5

Constitution, statutes, and regulations:

U.S. Const. Amend. I 4, 5
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978:
§ 302, 104 Stat. 5031-5032 14
§ 302(b)(1)(A), 104 Stat. 5031 14
§ 303, 104 Stat. 5036 14
Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(42) 4
8 U.S.C. 1101(a)(42)(A) 1
8 U.S.C. 1103 18
8 U.S.C. 1105a(a)(4) 19
8 U.S.C. 1158 18
8 C.F.R.:
Section 3.2 19
Section 3.8 19
Section 3.12 19
Section 103.5 19
Section 208.13(a) 16

Miscellaneous:

Encyclopedia of the Third World (3d ed. 1987) 14
56 Fed. Reg. 12,745-12,746 (1991) 14
G. Goodwin-Gill, *The Refugee in International Law* (1983) 9, 10
H.R. Rep. No. 608, 96th Cong., 1st Sess. (1979) 12
Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979) 2, 6
Musalo, *Refuge for Conscientious Objectors*, 26 San Diego L. Rev. 849 (1989) 18

Miscellaneous—Continued: Page

S. 643, 96th Cong., 1st Sess. (1979) 13
S. Rep. No. 256, 96th Cong., 1st Sess. (1979) 13
The Random House Dictionary of the English Language (1966) 3
Webster's Second New International Dictionary of the English Language (1957) 3

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1342

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent and his amici have abandoned the court of appeals' reasoning. In his brief in opposition (at 11-13), respondent defended the court's conclusion that a threat by two guerrillas to join them or face the consequences was "properly categorized" as "persecution on account of * * * political opinion," 8 U.S.C. 1101 (a)(42)(A), because the persecutors' ultimate goal was political. Pet. App. 12a. Neither respondent nor his amici now advance that position. It is thus common ground that "persecution on account of * * * political opinion" refers to the asylum applicant's political opinion, not (as the court of appeals thought) the guerrilla group's "political goals." Pet. App. 18a. The latest positions offered by respondent and his amici, however, are no more faithful to the Refugee Act than the earlier one.

1. The ordinary meaning of "persecution on account of * * * political opinion" is that the intentional infliction

of harm (the "persecution") must be because of ("on account of") the applicant's political beliefs. Gov't Br. 12-14.

a. Respondent and his amici would go further. They would extend asylum eligibility to anyone who fears harm threatened not because of his political opinion but because of his conduct, as long as that conduct is motivated by a political opinion. Thus, respondent argues that an applicant is eligible for asylum if he (1) commits an act, such as refusing to join a guerrilla organization, "on account of * * * political opinion" and (2) is threatened for that act. Resp. Br. 6, 8, 10, 12. Amicus United Nations High Commissioner for Refugees (UNHCR) reaches the same result by watering down the "on account of" clause: according to the UNHCR, "[t]he 'on account of' * * * language requires only that there be some nexus between an opinion that can be characterized as political and the risk of harm." UNHCR Br. 17. Those interpretations contravene the Refugee Act and confuse persecution with suffering generally.

i. Respondent's interpretation is foreclosed by the terms of the Refugee Act. The Act extends asylum only to applicants who fear "*persecution* on account of * * * political opinion," not harm threatened on account of *an act* undertaken on account of political opinion. As the UNHCR points out in the *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 81 (Geneva 1979) (emphasis added): "It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, *and the fact that it has led or may lead to the persecution that he claims to fear.*" Thus, the applicant's political opinion, not the behavior motivated by that opinion, must be what leads to the persecution.[1]

[1] The fallacy of respondent's interpretation is made apparent by substituting "refusing to join a guerrilla group" for "persecution" in the Refugee Act. See Resp. Br. 6, 8, 10, 12. With that change, the Act extends asylum eligibility to anyone who has "a well-founded fear of [refusing to join a guerrilla group] on account of * * * political opinion." A victim of forced recruitment, however, does not fear refusing to join a guerrilla group, he fears the consequences of that refusal. And it does not follow from the premise that the *refusal* is because of the applicant's political opinion that the *consequences* occur for the same reason.

Although the UNHCR's interpretation does not require rewriting the Refugee Act, it does require the use of an idiosyncratic definition of "on account of." The UNHCR defines that phrase to mean "nexus." As we pointed out in our opening brief, however, Gov't Br. 13, the contextual definition of that phrase is "because of" or "by reason of." *Webster's Second New International Dictionary of the English Language* 16 (1957); *The Random House Dictionary of the English Language* 10 (1966). The applicant's political opinion must not merely relate to the threat of harm through some lengthy chain of causation —it must be the reason *why* the persecutor issues his threat. Cf. *Wayte* v. *United States*, 470 U.S. 598, 610 (1985) (using "because of" to mean an intention to inflict "adverse effects upon an identifiable group" (quoting *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979)).

ii. More fundamentally, both respondent's and the UNHCR's interpretations confuse persecution with suffering generally. That confusion is capsulized in the UNHCR's observation that "[a]lthough the motivation of a persecutor may be relevant, ultimately it is the fact of persecution, not any specific intent to persecute, that one reasonably fears and from which the Refugee Act seeks to provide protection." UNHCR Br. 15-16.

Contrary to the UNHCR's supposition, the "ordinary meaning" of "persecution," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), does not comprehend unintentional infliction of harm. Gov't Br. 13. We do not use the term "persecute" to describe the accidental or incidental imposition of harm: negligent drivers do not "persecute" slow-moving pedestrians and natural disasters do not "persecute" humanity. What distinguishes persecution

from any other harm is *why* the victim is singled out: persecution is the infliction of suffering *to punish an individual for possessing a belief or characteristic* the persecutor seeks to overcome. *Matter of Acosta*, 19 I. & N. Dec. 211, 223 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).[2] Thus, where the applicant expresses a political opinion and the persecutor singles out the applicant in order to punish him *for his opinion*, the applicant is a refugee. But where the applicant is punished for conduct without regard for his opinion, the punishment is for his act, not his opinion. It is the motivation for imposing harm that distinguishes persecution from all other forms of oppression. *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 513 (BIA 1988).[3]

The implications of respondent's and the UNHCR's redefinitions of "persecution" are startling. If they are right, this Court has routinely upheld acts of "political persecution" against First Amendment challenge, including: a criminal conviction for burning a draft card to protest the Vietnam War, *United States* v. *O'Brien*, 391 U.S. 367 (1968); an indictment for failing to register

[2] Contrary to amicus UNHCR's contention, Br. 11 n.16, the fact that persecution is, by its nature, intentional does not render the "on account of" phrase redundant. That phrase specifies what types of persecution make an applicant eligible for asylum.

[3] Respondent and the UNHCR contend that because the Refugee Act looks to the applicant's fear, it focuses on the applicant's state of mind rather than the persecutor's. Resp. Br. 8-9 & n.11; UNHCR Br. 11-12. That formulation, however, begs the question of *what* the applicant fears. To fear "persecution on account of * * * political opinion," the asylum applicant must fear that the persecutor will single him out *because of his opinion*; a fear that something else may motivate the persecutor to harm him will not suffice. Furthermore, the fear must be "well-founded." 8 U.S.C. 1101(a)(42). Thus, objective facts must support the applicant's belief that his political opinion may motivate the persecutor to single him out for punishment. Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. at 440.

for the draft based on the registrant's letter of protest, *Wayte* v. *United States*, *supra*; a regulatory ban on sleeping in a public park to protest the plight of the homeless, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984); and a city's ban on posting of all signs on public property, *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984). In each case, those invoking the First Amendment sought protection for conduct they engaged in "on account of" their political opinion. In each case, the Court denied protection because the government may ordinarily punish conduct motivated by political beliefs as long as the sanction is not aimed at the belief. Yet under respondent's analysis, the government actions this Court upheld all represent paradigm cases of persecution, for the individuals were singled out and punished (or threatened with punishment) on account of politically motivated conduct. Either the First Amendment condones political persecution, or respondent's and the UNHCR's understanding of that concept is profoundly wrong.

b. The practice of other countries is consistent with that of the United States: punishment for acts motivated by an asylum applicant's political opinion is not necessarily persecution "for reasons of * * * political opinion" under the 1951 Convention or the 1967 Protocol or municipal legislation implementing those acts.

In *Musial* v. *Minister of Employment and Immigration*, 1 F.C. 290 (Fed. Ct. Can. 1981), an alien in Canada feared he would be disciplined for evading Poland's draft. *Id.* at 291, 293. He had refused to serve because he opposed the Polish army's participation in the Soviet occupation of Afghanistan. *Ibid.* He urged what respondent urges today: that punishing him for conduct motivated by political opinion is persecution by reason of political opinion. *Id.* at 291, 293-294. The Canadian Court of Appeals rejected that argument, adopting the position the government urges in this case:

> [The alien's] "liberal interpretation" of the definition of the word "refugee" appears to me to be in-

> compatible with the requirement of that definition that a refugee have "a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion." A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it.

Id. at 294 (Pratte, J., joined by Culliton, D.J.).[4]

Amici Lawyers Committee for Human Rights et al., Br. 6-13, rely on decisions upholding the claims of religious conscientious objectors (principally Jehovah's Witnesses) who claim that the enforcement of universal conscription laws burdens their religious freedom and thereby constitutes persecution on account of their religion. Those decisions do not support respondent's position.

First, the authorities on which amici Lawyers Committee rely distinguish between religious conscientious objectors and applicants who, like respondent, claim to fear persecution on account of political opinion. The UNHCR's *Handbook* (¶ 172) states that a sincere religious conscientious objector whose "convictions are not taken into account by the authorities of his country in requiring him to perform military service * * * may be able to establish a claim to refugee status." No parallel provision exists for applicants who seek asylum because of "persecution on account of * * * political opinion." Cf. *id.* ¶ 171 ("It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action."). Thus, although amici Lawyers Committee are correct that the Canadian Immigration Appeal Board (the Canadian counterpart of the United States Board of Immigration Appeals) has held that punishment of Jehovah's Witnesses for draft

[4] Thus, Amici Lawyers Committee for Human Rights et al.'s reliance on decisions of the Canadian Board of Immigration Appeals, Br. 14-17, is misplaced. Decisions of the Federal Court of Appeal are superior to those of the administrative Board.

evasion is persecution on account of religion, the Canadian Court of Appeals—which is superior to that administrative board—unanimously held that, regardless of the status of punishment for religiously motivated conduct, punishment for conduct motivated by *political opinion* is not persecution. *Musial*, 1 F.C. at 292-293 (opinion of Thurlow, C.J.); *id.* at 294 (opinion of Pratte, J., joined by Culliton, D.J.). It is not necessary in this case to determine the circumstances in which religious conscientious objectors would be eligible for asylum.[5]

Second, by highlighting the decisions that granted asylum to religious conscientious objectors, amici Lawyers Committee suggest that state practice is uniform on this subject. Br. 9-13. It is not. The UNHCR itself has appeared on both sides of the debate. See *Matter of Canas*, 19 I. & N. Dec. 697, 705 n.5 (BIA 1988). The opinion of the Canadian judges in *Musial* quoted above suggests that they would reject the conscientious objector's claim. 1 F.C. at 294 (opinion of Pratte, J., joined by Culliton, D.J.). And the Immigration Appeal Tribunal of the United Kingdom, interpreting the "for reasons of" language in the Convention as incorporated into British statutory law, rejected the asylum claim of a Jehovah's Witness who faced "a long term of imprisonment for contravention of the law on conscription" if he returned to his native Greece and refused to serve in its armed forces. The rationale of that tribunal is consistent with that of the BIA in this case:

> In our view there is no doubt that the appellant has a well-founded fear of being punished if he has to

[5] That question is presented by the government's pending petition for a writ of certiorari in *INS* v. *Canas-Segovia*, No. 90-1246 (filed Feb. 6, 1991). Although we agree with amici Lawyers Committee, Br. 13-19, that conscientious objectors who face *disproportionately* severe punishment on account of their religious beliefs are eligible for asylum, we disagree, for the reasons stated in our petition (at 14-20), that the enforcement of universal conscription laws with uniform penalties for draft evasion constitutes persecution.

> return to Greece. * * * The question remains: In this case is it persecution for reasons of religion or political opinion? We do not think that it is. The immediate cause of the persecution is a refusal to obey the law of the land, and the fact that such refusal may be due to religious beliefs or political opinion is in our view only the secondary cause. If the Jehovah's Witnesses in Greece were being persecuted for reasons of religion one would expect that their teachings and meetings would be proscribed. This is evidently not the case and they appear to be free to worship as they please. We do not consider that the relevant law is discriminatory, because it appears to us that other religious orders with similar views as to military service (Quakers for example) and indeed persons with no religious beliefs at all but whose conscience compelled them to refuse service, would all be treated in the same way.

Dooneias v. *Secretary of State for the Home Department*, as quoted, approved, and applied in *Atibo* v. *Immigration Officer, London (Heathrow) Airport*, Imm. A.R. 93 (1978). The same analysis applies here: because respondent was threatened for his conduct without regard to the opinion that motivated it, he was not "persecuted on account of * * * political opinion." The persecutor's motive is determinative.

2. Respondent is not eligible for asylum even on the tests proposed by him and his amici.

a. In the court of appeals, respondent asserted that by refusing to join the guerrillas he was "asserting his neutrality." Resp. C.A. Br. 7. Reversing field in this Court, respondent now implies that he refused to serve because he supports the government of Guatemala, quoting his statement that he did not want to be "against the government." Resp. Br. 9 (quoting C.R. at 64).

A review of the entire exchange between respondent and his trial counsel, however, makes clear that respondent's refusal to oppose the government was instrumental, not political. To join the guerrillas, respondent explained,

"is to die there" as once "you are against the government" then "the government is against you and against your family." C.R. at 64. Ultimately, respondent confirmed that his refusal to join was caused by his fear of death, not political aversion: "I was afraid to join the guerrillas, yes." *Ibid.* This is exactly how the Immigration Judge viewed the testimony: "The respondent testified that he did not want to join the guerrillas because [they] are against the government and he was afraid that the government would retaliate against him and his family if he did join." *Id.* at 55. The record in this case reveals that respondent refused to join the guerrillas for the entirely understandable purpose of self-preservation. Neither respondent's refusal to join, nor the guerrillas' recruitment of him, had anything to do with respondent's political opinion.

b. Amicus UNHCR proffers a different, even more flawed application. A refusal to join a guerrilla group, it argues, expresses a political opinion regardless of the applicant's actual motivation:

> Regardless of the precise characterization of an individual's motives, the conscious refusal to join a guerrilla group inevitably places the individual in *political* opposition to that group. "Refusal to bear arms, however motivated, reflects an essentially political opinion * * *; it is a political act." G. Goodwin-Gill, [*The Refugee in International Law*] 34 [(1983)].

UNHCR Br. 18 (ellipsis in original); see also American Immigration Lawyers Association (AILA) Br. 20. For three reasons, the UNHCR's position is in error.

First, the UNHCR's theory must apply not only to those evading guerrilla conscription, but to those dodging government drafts as well. After all, it is as much a political statement to resist the draft as it is to resist the guerrillas. In fact, the quotation on which the UNHCR relies does not refer to guerrilla conscription; it refers to governmental conscription. Without the convenient ellipsis, it reads: "Refusal to bear arms, however moti-

vated, reflects an essentially political opinion regarding the permissible limits of *state* authority; it is a political act." G. Goodwin-Gill, *supra*, at 34 (emphasis added). Thus, the UNHCR's view makes every draft-dodger a refugee.

Respondent and his amici attempt to distinguish government conscription from guerrilla conscription, correctly pointing out that international law permits military conscription and distinguishes it from kidnapping. Resp. Br. 18-19; UNHCR Br. 21. But the authority they cite, G. Goodwin-Gill, *supra*, does not differentiate between governments and guerrillas. Nor does the Refugee Act: it distinguishes between persecution and other conduct, not between authorized and unauthorized persecution. Whether certain acts amount to persecution cannot depend on whether the perpetrator is a guerrilla or a government representative; what distinguishes persecution from other forms of oppression is why the victim is selected—not by whom.

Any distinction between legitimate and illegitimate conscription would require precisely the type of ad hoc political judgments to which respondent and amici object, AILA Br. 7-19; see Resp. Br. 25-26: The BIA would have to decide which governments are legitimate (and can therefore operate a draft) and which are not. The Refugee Act neither requires nor permits the BIA to decide such questions. It need only decide a case-specific factual question: whether the applicant reasonably fears that someone is motivated to harm him because of his political opinion.

Second, the argument that a refusal to take up arms with a guerrilla band is necessarily "political" is logically and empirically false. An asylum applicant's refusal to bear arms may reflect a fear of combat, a desire to let others do the hard work of the revolution, or any number of other reasons having nothing to do with his political opinion. In fact, it was one of those non-political reasons that motivated respondent: he has never stated that he lacks sympathy for the guerrillas, or that he supports the government. Instead, he said he was afraid of being

killed. Mortal fear, no matter how understandable, is not a political opinion.

Third and most important, the UNHCR's construction ignores the requirement that the fear be of "persecution on account of * * * political opinion." A guerrilla group's threat of punishment for refusing to join them does not necessarily reflect hostility toward the recruit's political opinion. Guerrillas may threaten people for reasons that have nothing to do with political opinion, the most likely of which is that such threats increase their recruitment rate. That is what the record suggests motivated the guerrillas here. Nothing the guerrillas did or said suggested they thought respondent held an improper political opinion; they even offered to pay respondent for joining them. Gov't Br. 5. Indeed, the mere fact that the guerrillas tried to recruit respondent in the first place suggests they did not see his political beliefs as undesirable: common sense and the BIA's experience both suggest that guerrillas would not invite a suspected "political enemy," Resp. Br. 11, to become a comrade in arms. See *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 514-515 (1988).[6]

At bottom, respondent and his amici never explain why conscription amounts to persecution. Respondent's situation is wholly unlike that of the Christians under the Romans, the Jews under the Nazis, or any other people who were made to suffer for their race, nationality, or beliefs. Nothing in the record suggests respondent was singled out because of his opinions—whatever they are. Contrary to Amicus American Immigration Lawyers Association, Br. 26, we recognize that Jews fleeing Nazi Germany would have been eligible for asylum under the subsequently enacted Refugee Act. But the Act should not be stretched to cover those who were not singled out

---

[6] This is not *always* the case. In World War II, the Nazis used Polish and Russian prisoners of war to clear minefields, and the North Vietnamese allegedly did the same with South Vietnamese POWs. There is no evidence that Guatemalan guerrillas engage in that type of barbarism; nor is there any evidence that they intended so to employ respondent.

on the basis of one of the five listed characteristics. As Judge Sneed recently wrote:

> We distort the meaning of an important requirement for refugee status when we permit political aloofness to serve as an active "political opinion," that endangers its holder. It also demeans the true martyr for whom asylum was intended.

Mendoza Perez v. *INS*, 902 F.2d 760, 767-768 (9th Cir. 1990) (concurring opinion).

3. Respondent's and the UNHCR's proposed expansion of asylum eligibility also conflicts with Congress's decision not to "expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb." H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979).[7]

Although the Refugee Act may have a "broad, humanitarian purpose," Resp. Br. 16; see UNHCR Br. 10, that purpose is not without bounds. Congress specifically rejected a proposed definition of refugee that included persons displaced by civil strife. Gov't Br. 17-20. Respondent is one of those people Congress excluded. He left his country because civil war made it unlivable; he was, in the words of the rejected Senate bill, "displaced

[7] Respondent accuses us of misreading the legislative history on this point. Resp. Br. 16-17 n.24. He is mistaken. Respondent's quotation from the House Report leaves off the critical last sentence, which explains *why* the Refugee Act does not expand the number of aliens receiving asylum: the Act "does not create a new and expanded means of entry, but instead *regularizes and formalizes the policies and practices that have been followed in recent years.*" H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979) (emphasis added). One of the practices that was regularized and formalized by the Refugee Act was requiring evidence of the persecutor's motive. See, *e.g.*, *Matter of Pierre*, 15 I. & N. Dec. 461, 463 (BIA 1975) (rejecting claim of persecution where the only demonstrated motive was strictly personal); *Matter of Diaz*, 10 I. & N. Dec. 199, 201-202 (BIA 1963) (rejecting claim where nothing suggested that anyone would denounce the applicant for political, as opposed to personal, reasons).

by military * * * disturbance" and "unable to return." S. 643, § 101(A)(42), S. Rep. No. 256, 96th Cong., 1st Sess. 20 (1979). There is no evidence that he left because he feared being singled out because of his political opinion.

a. As respondent points out, the "term 'displaced persons' would have applied to persons who * * * were located within their own countries." Resp. Br. 17. From this, respondent seeks to imply that Congress rejected the displaced persons provision not because it included people like respondent, but because it included people who, unlike respondent, were in their own countries when they applied for asylum. But if Congress had intended only that change, it would have so amended the provision. It did not. Instead, it rejected the provision entirely, excluding not only victims of military disturbance who were still in their own countries but also those who, like respondent, had already entered this country.

Amicus UNHCR contends that Congress rejected the displaced persons provision because it wanted to differentiate between victims of "targeted persecution" and victims of "civil strife." UNHCR Br. 20. Aside from the redundancy of the phrase "targeted persecution" (persecution is by definition intentional and directed), we agree. But the Refugee Act requires not just that the applicant be a target; he must be a target because of his political opinion or one of the four other statutory bases of eligibility.

b. Despite its broad, humanitarian purpose, Congress adopted a precise definition of "refugee." Congress did eliminate numerous barriers to asylum, such as certain ideological and numerical restrictions. Resp. Br. 16-17. But the elimination of those restrictions was, in part, what prompted Congress to reject an expansive definition of "refugee": if feared an overwhelming influx of asylum applicants. Gov't Br. 20. Yet that is exactly what respondent's and amici's constructions would invite.

Respondent's and his amici's position makes all those who reasonably fear guerrilla conscription eligible for

asylum. See, *e.g.*, UNHCR Br. 20. There are millions of combat-age males in Guatemala, El Salvador, Honduras, and Nicaragua alone,[8] most of whom have reason to fear being approached by guerrillas at some point in their lives. Indeed, respondent's argument must be extended to those who reasonably fear being approached by the government as well, as government conscription cannot be distinguished from conscription by guerrillas. Pp. 9-10, *supra*; see *e.g.*, *Sanchez-Trujillo* v. *INS*, 801 F.2d 1571 (9th Cir. 1986) (addressing claim that young, male unenlisted Salvadorans are a persecuted group).

We acknowledge the harsh fact that young men in Guatemala face grave danger; but that does not convert them into refugees. For such circumstances, immigration law provides a different mechanism: Section 302 of the Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 5031-5032, which empowers the Attorney General to grant aliens "temporary protected status" on a country-by-country basis if returning them would "pose a serious threat to [their] personal safety" because of "ongoing conflict" in their homeland. *Id.* § 302(b)(1)(A), 104 Stat. 5031. Thus, Congress did provide for victims of civil strife like respondent; but it did so by authorizing the Attorney General to grant temporary protected status, not asylum.[9]

4. In *Cardoza-Fonseca*, this Court invited the BIA to develop the meaning of "well-founded fear of persecution" through case-by-case adjudication. See *Cardoza-Fonseca*, 480 U.S. at 447-448. In the five years since

---

[8] See *Encyclopedia of the Third World* 630, 762, 848, 1435 (3d ed. 1987) (more than 1 million youths (persons aged 15-24) in El Salvador, more than 1.5 million youths in Guatemala, more than 800,000 youths in Honduras, and more than 656,000 youths in Nicaragua, about half of whom are male).

[9] Currently, only nationals from four countries—El Salvador, Lebanon, Kuwait, and Liberia—are eligible for temporary protected status. Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 5036; 56 Fed. Reg. 12,745-12,746 (1991).

Cardoza-Fonseca, the BIA has invested its experience and energy into developing the meaning of the Refugee Act. That effort merits deference.

a. Contrary to respondent's and amici's contention, determination of the persecutor's motive is not impossible, and it does not involve getting "names and addresses" of the guerrillas and inquiring into organizational intent. Resp. Br. 13; see also UNHCR Br. 16; AILA Br. 21. The BIA does not require "direct" proof of "exact" or "specific" intent. Resp. Br. 21. It only requires evidence from which the persecutor's motive may be fairly inferred. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987) (applicant can meet burden by showing persecutor is aware or could become aware of his political opinion and has the power and inclination to punish him for it); see also *Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276, 286-287 (BIA 1985) (rejecting asylum claims where applicants produced no "objective facts that support an inference" of persecution).

This is not too much to ask. For one thing, the statute requires it. For another, it is eminently reasonable. Often, the act of persecution itself demonstrates motive. For example, a cross burned on a black person's lawn or a swastika scrawled on a Jewish Temple itself announces the perpetrator's motive—racial or religious animus. See, *e.g.*, *Matter of Villalta*, Int. Dec. 3126 (BIA 1990) (white hand with "E.M."—"Escuadron de la Muerte"—painted on a door indicated that El Salvadoran death squads had singled out the applicant for his political opinion). Indeed, those who seek to repress political beliefs usually make sure the victim and his associates know their motive: they thereby ensure that everyone is aware of how dangerous a politically incorrect thought can be.

In asylum cases, the BIA carefully examines the facts, searching for indications that the persecutor might want to hurt the applicant because he disagrees with the ap-

plicant's political opinion.[10] The BIA considers, for example, whether there is any evidence that the applicant has political beliefs that he has expressed by words or conduct, whether the persecutor has become aware of those opinions, and whether the persecutor has indicated that he views the applicant's beliefs as inimical. If the answers to all of those inquiries are no, there is no proof that the forced recruitment was "on account of" the applicant's political opinion. See Pet. App. 32a-33a; see *e.g.*, *Matter of Vigil*, 19 I. & N. Dec. 572, 576-577 (BIA 1988); *Matter of Maldonado-Cruz*, 19 I. & N. Dec. at 513-516.

One need look no further than the unpublished opinions cited by respondent for proof that applicants are capable of producing, and the BIA is sensitive to, evidence of motive. In many of those cases, the BIA concluded that a reasonable applicant would infer that the persecutor had singled him out because of his political opinion.[11]

---

[10] Asylum applicants, by regulation, bear the risk of nonpersuasion. 8 C.F.R. 208.13(a). Contrary to respondent's assertion, Resp. Br. 11, that burden does not shift to the INS. That approach is sensible because, in the usual case, only the applicant is capable of producing evidence; the INS cannot send personal investigators to the applicant's homeland.

[11] For example, in *Matter of Re*, No. A 29 773 836 (BIA Dec. 28, 1990), the Afghani government interrogated the applicant and accused him of being a spy after he refused to join communist and pro-communist youth organizations, demonstrating that they perceived him as a political enemy. *Id.* at 83-84; accord *Matter of Diaz-Morales*, No. A24 584 030 (BIA Aug. 14, 1987) (union organizer who espoused the view that citizens had the right to organize and participate in government reasonably feared persecution on account of political opinion where (1) the secret police twice detained him and ordered him to stop organizing unions; (2) expert testimony established that the government viewed union leaders as political subversives and systematically liquidated them; and (3) experts testified that the applicant would face the same fate if he returned even if he were not active in unions); *Matter of Gutierrez-Cano*, No. A26 677 072 (BIA Aug. 3, 1987) (granting asylum where: (1) the applicant and his family had a definite political opinion to which the Sandinistas were hostile; (2) the applicant's membership in the Liberal Party and the prominence of his family in the Somoza government combined with his refusal to join pro-Sandinista groups made or could have made the Sandinistas aware of his political view; and (3) the Sandinistas demonstrated an ability and willingness to persecute him by imprisoning his aunt for two months, labelling her an "enemy" of the revolution, warning the applicant that he could not continue studying unless he joined a pro-Sandinista group, and telling him that he would "regret" not joining).

b. The BIA's decisions holding that the asylum applicant need not prove the "specific," "exact," or "precise" motivation of the persecutor, Resp. Br. 7, 21, or introduce "direct" evidence of his intent, Resp. Br. 13, are entirely consistent with its decisions that forcible recruitment is not necessarily "persecution on account of * * * political opinion." The meaning of a statutory requirement is distinct from the evidence necessary to meet it. A court can require evidence that the respondent's political opinion motivated the persecution without requiring affidavits from the persecutor or other unreasonable forms of proof. And that is what the BIA has done: the applicant need only produce evidence from which the persecutor's motives can be fairly inferred.

c. Nor is the BIA inconsistent on whether forcible recruitment is persecution "on account of * * * political opinion."[12] While respondent and amici rely heavily on the BIA's decision in *Matter of Salim*, 18 I. & N. Dec. 311 (1982), Resp. Br. 24-25; AILA Br. 8-10, 16 & nn.22, 24, 18 n.28, that case was an unremarkable decision on its facts. The applicant reasonably feared arrest for his membership in the Mujahidin rebels opposing the Soviet occupation in Afghanistan; his brothers had been ar-

---

[12] Amici Lawyers Committee argue (Br. 4 n.3, 8 n.7) that the BIA has been inconsistent inasmuch as it does not require proof of the persecutor's motive where conscientious objectors suffer disproportionately severe punishment. Punishing conscientious objectors more severely than others who engage in identical conduct, however, *must* be motivated by the conscientious objector's political or religious opinion: there is no other reason why otherwise identically situated individuals would be treated differently.

rested on account of their membership. 18 I. & N. Dec. at 312. The decision, however, relied on Salim's refusal to serve in the occupying Soviet army, holding that forcing Salim to serve in a foreign force would constitute persecution. *Id.* at 313. However unsatisfying the rationale, respondent and amici make far too much of it.

Salim was the first draft evasion case the BIA considered under the Refugee Act of 1980. Musalo, *Refuge for Conscientious Objectors*, 26 San Diego L. Rev. 849, 861 (1989). While it may have been a false start, it was quickly corrected: to our knowledge, it was never followed in any context other than the Soviet invasion of Afghanistan. Indeed, *Salim* is now a dead letter, since the Soviets have withdrawn. See *Matter of Izatula*, Int. Dec. No. 3127 (BIA Feb. 6, 1990).[13]

5. This Court should not remand for further fact-finding. Although the BIA held that respondent's fear was not well-founded,[14] it also held that he failed to prove

[13] Amicus American Immigration Lawyers Association argues an additional ground for refusing to defer to the BIA's position: that the Refugee Act was intended to restrict the Executive's discretion in immigration policy. AILA Br. 26-29. The argument is both correct and meaningless. Of course the Refugee Act limited the Executive's discretion: the Executive only *executes* the statute enacted by Congress. Where the statute leaves gaps, however, this Court has reasonably understood Congress to have delegated policy-making authority to the agency entrusted to administer that statute, leaving it to the agency to fill those gaps. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). In that event, the agency's interpretation is entitled to substantial deference. *Ibid.* Congress delegated administration of the immigration laws to the Attorney General, see 8 U.S.C. 1158; 8 U.S.C. 1103, who has, through the BIA, developed substantial experience in these matters. Therefore, to the extent that "persecution on account of * * * political opinion" presents gaps in meaning which may be fleshed out through the BIA's experience and expertise, the BIA's interpretation must be accorded substantial deference. This Court has already so held. *Cardoza-Fonseca*, 480 U.S. at 447-448.

[14] Respondent remained at home for two months after the guerrillas visited, C.R. at 55, and told INS agents he came to the U.S. for economic reasons, *id.* at 56. See Pet. App. 30a-32a.

that what he feared was "persecution on account of * * * political opinion." Pet. App. 32a-33a ("It can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive."). Thus, contrary to respondent's contention, Resp. Br. 26, the rule of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 199 (1947), does not apply since we defend the BIA's *ratio decidendi*, not a post-hoc rationalization by INS counsel. Indeed, remand is expressly prohibited by statute. Where, as here, the BIA, as the Attorney General's delegate, makes a finding based on "reasonable, substantial, and probative evidence," the Immigration and Nationality Act provides that a petition for judicial review "shall be determined solely upon the administrative record upon which the deportation order is based" and that a finding of fact, "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." 8 U.S.C. 1105a (a)(4).[15]

Respondent was not misled into thinking that he did not need to prove that the guerrillas threatened him "on account of" his political opinion. The statute requires it. Rulings of the BIA require it. *E.g.*, *Matter of Maldonado-Cruz*, 19 I. & N. Dec. at 513. Even the Ninth Circuit (until recently) required it. See, *e.g.*, *Mendoza Perez* v. *INS*, 902 F.2d at 762 (even if persecution is sufficiently likely, the alien "must also show that the persecution was a result of one of the five characteristics set forth" in the Refugee Act); *Desir* v. *Ilchert*, 840 F.2d 723, 727 (1988) ("[P]ersecution involves 'the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.' *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)."); *Kovac* v. *INS*, 407 F.2d 102, 107 (1969) (the Refugee Act "shifts the em-

[15] If respondent has new evidence, the proper procedure is for him to file a motion to reopen. 8 C.F.R. 3.2, 3.8, 3.12, 103.5.

phasis from the consequences of the oppressive conduct to the motivation behind it").[16]

In any event, remand would be pointless since the flaw in respondent's case cannot be cured by further fact-finding. Even evidence that Guatemalan guerrillas kill people who do not join them, Resp. Br. 29, would not make respondent eligible for asylum because such retaliation would not be "on account of" respondent's political opinion—it would be intended to terrorize prospective recruits into joining. In this case, the certified administrative record establishes that neither respondent's refusal to join the guerrillas nor their threat of harm was on account of respondent's political opinion.

For the foregoing reasons and those stated in our opening brief, that part of the court of appeals' judgment holding respondent eligible for asylum should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

---

[16] Although such proof is not essential under current Ninth Circuit case law, an applicant still has every incentive to present it to strengthen his claim. See *Canas-Segovia* v. *INS*, 902 F.2d 717, 726 (9th Cir. 1990).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45077

FILED
AUG 13 1991
OFFICE OF THE CLERK

(5)

No. 90-1342

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

VS.

JAIRO JONATHAN ELIAS-ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

KEVIN R. JOHNSON*
KING HALL SCHOOL OF LAW
UNIVERSITY OF CALIFORNIA
AT DAVIS
Davis, California 95616
Telephone: (916) 752-8047

ROBERT B. HAWK
JOSHUA R. FLOUM
SERGIO GARCIA-RODRIGUEZ
ANNA S. MCLEAN
HELLER, EHRMAN, WHITE &
MCAULIFFE
333 Bush Street
San Francisco, CA 94104-2878
Telephone: (415) 772-6000

ROBERT RUBIN
SARA CAMPOS
SAN FRANCISCO LAWYERS'
COMMITTEE FOR
URBAN AFFAIRS
301 Mission Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444
Counsel For Amicus Curiae

*Counsel of Record

August 14, 1991

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF AMICUS CURIAE	1
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE BIA'S INTERPRETATION OF THE REFUGEE ACT IS NOT ENTITLED TO DEFERENCE	7
A. The BIA's Inconsistent Interpretations of the Statutory Language at Issue in This Case Are Entitled to Little, if Any, Deference	7
1. Afghan Cases	8
2. Salvadoran and Guatemalan Cases	9
3. The Effects of the Inconsistencies	11
B. Because the BIA's Inconsistent Interpretations of the Statute Appear To Be Influenced by Impermissible Bias, This Court Should Not Defer to the Agency Interpretation in This Case	12
C. The Plain Meaning of the Statute Compels the Conclusion That an Individual Threatened with Violence by Leftist Guerrillas for Refusing To Join Their Ranks Has Been Persecuted on Account of Political Opinion	19
D. Because Congress Unambiguously Intended To Limit the Policy-Making Authority of the Executive Branch with Respect to Determining Eligibility for Asylum, the INS's Policy Justifications for Its Interpretation Must Be Rejected	23
II. IN ANY EVENT, THE BIA'S INTERPRETATION OF THE STATUTORY LANGUAGE IN QUESTION IS UNREASONABLE	26
CONCLUSION	30

TABLE OF AUTHORITIES

Cases

	Page
Adams Fruit Co., Inc. v. Barrett, 110 S. Ct. 1384 (1990)	23
American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991)	15
Balazoski v. INS, 932 F.2d 638 (7th Cir. 1991)	17
Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984)	20, 21
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)	7, 12, 23, 29
Bridges v. Wixon, 326 U.S. 135 (1945)	29
Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985)	27
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	5, 14, 19, 23, 26
Church of Scientology v. IRS, 792 F.2d 153 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987)	12
Continental Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444 (D.C. Cir. 1988)	7, 27
Costello v. INS, 376 U.S. 120 (1964)	29
Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988)	20
Dole v. United Steelworkers, 494 U.S. 26 (1990)	22
EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991)	23
EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981)	7
FAIC Sec., Inc. v. United States, 768 F.2d 352 (D.C. Cir. 1985)	27
Fiallo v. Bell, 430 U.S. 787 (1977)	19
Fong Haw Tan v. Phelan, 333 U.S. 6 (1948)	29
Fort Stewart Schools v. FLRA, 110 S. Ct. 2043 (1990)	19, 24
Gibson v. Berryhill, 411 U.S. 564 (1973)	13
Goldberg v. Kelly, 397 U.S. 254 (1970)	13
Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985)	20
Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408 (7th Cir. 1987)	7
In re Momen, File No. A27-026-208 (BIA Oct. 10, 1985)	9
In re Murchison, 349 U.S. 133 (1955)	13
In re Noory, File No. A24-081-415 (BIA Oct. 28, 1985)	9
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	*passim*

TABLE OF AUTHORITIES

CASES

	Page
INS v. Doherty, 111 S. Ct. 950 (1991)	13
INS v. Errico, 385 U.S. 214 (1964)	29
INS v. Stevic, 467 U.S. 407 (1984)	15, 25
Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986)	22
K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)	19
M.A. v. United States INS, 899 F.2d 304 (4th Cir. 1990) (*en banc*)	18
Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1987)	*passim*
Matter of Canas, 19 I. & N. Dec. 697 (BIA 1988), *rev'd*, Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990)	8
Matter of Izatula, Interim Dec. No. 3127 (BIA Feb. 6, 1990)	8, 9
Matter of Maldonado-Cruz, 19 I. & N. Dec. 509 (BIA 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989)	10
Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987)	7, 8
Matter of Mohibi, File No. A27-497-579 (BIA July 27, 1987)	10
Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982)	8-9
Matter of Sopena-Hernandez, File No. A28-279-551 (July 15, 1987)	10
Matter of Vigil, 19 I. & N. Dec. 572 (BIA 1988)	10
Melendez v. United States Dep't of Justice, 926 F.2d 211 (2d Cir. 1991)	18
Montecino v. INS, 915 F.2d 518 (9th Cir. 1990)	17
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)	13-14, 28
NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987)	7, 27
Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524 (1991)	5, 7, 23
Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. 2668 (1990)	19

TABLE OF AUTHORITIES

CASES

Page

Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292 (11th Cir. 1990) (*per curiam*) 22-23
Platero-Cortez v. INS, 804 F.2d 1127 (9th Cir. 1985) ... 20-21
Reyes-Arias v. INS, 866 F.2d 500 (D.C. Cir. 1989) 14
Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 7
SEC v. Chenery Corp., 318 U.S. 80 (1943) 28
Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., 468 U.S. 137 (1984) 11
St. Agnes Hosp. v. Sullivan, 905 F.2d 1563 (D.C. Cir. 1990) 11-12
Sullivan v. Everhart, 110 S. Ct. 960 (1990) 19, 24
Sullivan v. Zebley, 493 U.S. 521 (1990) 22
The Chinese Exclusion Case, 130 U.S. 581 (1889) 19
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 27
Withrow v. Larkin, 421 U.S. 35 (1975) 13
Zacarias v. United States INS, 921 F.2d 844 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2008 (1991) ..... *passim*

Regulations, Statutes and Treaties

8 C.F.R. § 208.4(a) (1991) 17
§ 208.11(a) 17
§ 236.3(b) 17
Immigration and Nationality Act ("INA")
§ 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988) 2, 6, 13, 25
§ 203(a)(7)(A)(i), 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed) 15
§ 207, 8 U.S.C. § 1157 (1988) 25
§ 208, 8 U.S.C. § 1158 (1988) 2, 13, 25
§ 243(h), 8 U.S.C. § 1253(h) (1988) 2, 25
Neutrality Act of 1939, 22 U.S.C. §§ 441-465 20
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ..... *passim*

TABLE OF AUTHORITIES

Regulations, Statutes and Treaties

Page

United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967) 24
United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137 (1951)
Art. 3 24
Art. 42 24

Legislative Materials

Central American Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) 17
131 Cong. Rec. H9308 (daily ed. Oct. 29, 1985) (letter from Romano L. Mazzoli to President Reagan dated Sept. 27, 1985) 16
Department of Justice, Press Release (July 8, 1987), *reprinted in Central America Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) 17
Department of State, 102d Cong., 1st Sess., *Country Reports on Human Rights Practices For 1990* (Joint Comm. Print 1991) 3
H.R. Rep. No. 608, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code & Admin. News 141 (1979) 15, 26
H.R. Rep. No. 244, 101st Cong., 1st Sess., pt. 2 (1989) .. 17
S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979) 15

Other Authorities

Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 Int'l J. of Refugee L. 5 (1991) 9, 20, 21
Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981) 24

Page

Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252 (1990) 18

Anker, *Determining Ayslum Claims in the United States: An Empirical Case Study*, 19 N.Y.U. Rev. L. & Soc Change ——— (forthcoming) 18

Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1 (1990) 27

Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986) 13

Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549 (1988) 26-27

Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 915 (1988) 13

Friendly, "*Some Kind of Hearing*", 123 U. Pa. L. Rev. 1267 (1975) 14

L. Gerston, C. Fraliegh & R. Schwab, *The Deregulated Society* (1988) 14

Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243 (1984) 24

Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279 ..... 14, 16, 27

G. Loescher, & J. Scanlan, *Calculated Kindness: Refugee and America's Half-Open Door, 1945 to the Present* (1986) 16

Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247 (1990) .. 15, 17, 21

Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681 (1989) 16

Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495 (1986) 16

Page

Office of the United Nations High Commissioner For Refugees, *Handbook On Procedures And Criteria For Determining Refugee Status* (Geneva Sept., 1979) .. 20, 21

Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987) 27

Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071 (1990) 23

United States General Accounting Office, *Asylum: Uniform Application of Standards Uncertain—Few Denied Applicants Deported* (1987) 16, 17

Yarnold, *Administrative Policy Making: Adjudication by the Board of Immigration Appeals in Asylum-Related Appeals 1980-87*, 9 Pol'y Stud. Rev. 681 (1990) 16

N. Zucher & N. Zucher, *The Guarded Gates: The Reality of American Refugee Policy* (1987) 16

No. 90-1342

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

VS.

JAIRO JONATHAN ELIAS-ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

INTERESTS OF AMICUS CURIAE

Amicus curiae, the American Immigration Lawyers Association (AILA), is a national organization of lawyers and law school professors who practice and teach in the fields of immigration and nationality law.[1] AILA has a direct and substantial interest in the development of immigration law and in the case before the Court. The decision in this case may have a significant impact on the interpretation and application of the Immigration and Nationality Act, as amended by the Refugee Act of 1980, directly affecting many of the AILA's members and their clients. AILA seeks to ensure that any developments in immigration law facilitate the

[1] Petitioner and respondent have consented to the filing of this brief *amicus curiae*. The letters of consent are on file with the clerk.

administration of justice and maintain the integrity of the basic structure of immigration law.

STATEMENT

Amicus curiae addresses the important legal question whether, under the circumstances of this case, the judiciary is required to defer to the executive branch's interpretation of the statutory phrase "persecution . . . on account of political opinion" in section 201(a) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 102-03 (codified at 8 U.S.C. § 1101(a)(42)(A) (1988)). The Immigration and Naturalization Service (INS) claims that an alien threatened with death for refusing to join a revolutionary guerrilla organization cannot, without more, establish a likelihood of persecution on account of political opinion, a prerequisite for eligibility for asylum and withholding of deportation.[2] Because that interpretation was not the basis for the decision of the Board of Immigration Appeals (BIA) in this case, conflicts with other BIA decisions in a manner indicative of impermissible bias, is contrary to clear congressional intent, and is unreasonable, it is entitled to little, if any, deference.

After receiving a personal visit from armed guerrillas, respondent Jairo Jonathan Elias-Zacarias fled his native country of Guatemala and applied for asylum and withholding of deportation. *See Zacarias v. United States INS*, 921 F.2d 844 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2008 (1991). When Elias-Zacarias was 18, two guerrillas, masked and armed with machine

[2] To establish eligibility for asylum, an applicant must establish that he is a refugee as defined by § 101(a)(42) of the Immigration and Nationality Act (INA). *See* INA § 208, 8 U.S.C. § 1158 (1988). That section defines a refugee as a person who has been persecuted or who has a "well-founded fear of *persecution on account of* race, religion, nationality, membership in a particular social group, or *political opinion*." *Id.*, § 1101(a)(42)(A) (emphasis added). The same phrase is repeated in the withholding of deportation provisions. *See* INA § 243(h), 8 U.S.C. § 1253(h) (1988). The BIA's interpretation of "on account of . . . political opinion" therefore may affect eligibility for both asylum and withholding of deportation.

guns, came to his home and told him that he would join their forces.[3] When Elias-Zacarias refused, the guerrillas said they would return and that he should "think well" about his refusal. Respondent's Opposition to Petition for Writ of Certiorari 5a. Elias-Zacarias refused to join the guerrillas because "if you join the guerrillas . . . then you are against the government. You are against the government and if you join them then it is to die there. And, then the government is against you and against your family." *Id.* Fearing that the guerrillas would return and kill him if he refused to join,[4] *id.*, Elias-Zacarias fled the country, *see* Pet. App. 40a-41a.[5]

Although it found Elias-Zacarias to be a credible witness, the immigration court ruled that he failed to establish the requisite likelihood of persecution and ordered him deported to Guatemala. *See* Pet. App. 41-42a. It did not address whether the threat by the guerrillas constituted "persecution on account of . . . political opinion."

On appeal, the BIA had before it a letter from Elias-Zacarias's father stating that the guerrillas had come to his parents' home looking for him on two occasions since he fled Guatemala, *see* 921

[3] The INS claimed—in an argument that the court of appeals concluded was "wholly unwarranted speculation"—"that the guerrillas wore handkerchiefs not to conceal their faces, but 'because it might have been dusty that day.' " *Zacarias*, 921 F.2d at 852 n.8.

[4] The Department of State acknowledges that the leftist guerrillas in Guatemala engage in forced recruitment. *See* Department of State, 102d Cong., 1st Sess., *Country Reports on Human Rights Practices For 1990* 632, 639 (Joint Comm. Print 1991). The State Department also concluded that the Guatemalan government has been known to kill, torture, or "disappear" those suspected of sympathizing with the guerrillas. *Id.* at 631. The record before the immigration court included a State Department advisory letter concerning Elias-Zacarias's application noting that the guerrillas engage in forced recruitment. *See Zacarias*, 921 F.2d at 847.

[5] Zacarias explained that he did not simply move to another part of Guatemala because "if you go to another place they . . . think that you are something with the guerrillas." Pet. App. 8a.

F.2d at 852-53, yet the agency surmised that "the guerrillas [did not] harm those who refuse their invitation to join." Pet. App. 32a. On that basis, the Board found that, although the guerrillas attempted to recruit Elias-Zacarias to assist "in their attempt to violently overthrow the Guatemalan Government," he had not been threatened. *See* Pet. App. 32a-33a. The BIA did not address whether a threat by the guerrillas constituted "persecution on account of . . . political opinion."

The court of appeals reversed in part and held that the BIA's finding that Elias-Zacarias lacked a well-founded fear of persecution was not supported by substantial evidence. *See* 921 F.2d at 852. The court mentioned that the guerrillas' threat was on account of political opinion because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutors and because the persecutors' motive . . . is political." *Id.* at 850 (citations omitted). The court also noted that "there was no evidence to rebut the common sense inference" that the guerrillas were politically motivated. *Id.* at 852. The INS first raised the argument that the guerrillas' threat failed to constitute "persecution on account of . . . political opinion" in an unsuccessful petition for rehearing with suggestion for rehearing *en banc* in the court of appeals.

SUMMARY OF ARGUMENT

Amicus curiae respectfully submits that, under the facts and circumstances of this case, the Court should not defer to the Executive Branch's interpretation of the Refugee Act.

The INS's interpretation is entitled to little, if any, deference because the BIA has taken completely inconsistent positions on the question whether resistance to forced recruitment constitutes persecution on account of political opinion. For example, the Board has found that resistance to recruitment into the Afghanistan army constituted persecution on account of political opinion. On the other hand, the Board has held that resistance to forced recruitment into the armed forces of the government of El Salvador, guerrillas in El Salvador, and in this case, guerrillas in Guatemala, fail to constitute persecution on account of political

opinion. As this Court repeatedly has held, *see, e.g., Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2535 (1991), such an inconsistency removes this case from the category of agency interpretations properly afforded deference.

The BIA's changing interpretations appear tied to whether the applicant has fled a country with a government not favored (Afghanistan) or favored (El Salvador and Guatemala) by the Executive. Although Congress intended the Refugee Act of 1980 to remove foreign policy from refugee decisionmaking, the available evidence suggests that impermissible foreign policy considerations silently influence the Executive's asylum decisions. Because the consequences of an improper denial of asylum are severe, it is of utmost importance that the arbiter of such claims be impartial. Accordingly, the appearance of bias in agency decisions, which is clearly barred by the enabling statute, indicates that deference is inappropriate.

Moreover, the inconsistency in the BIA's interpretations illustrates that the INS's interpretation is simply the litigating position of an agency, which is not entitled to the deference accorded a well-reasoned agency interpretation of a statute. The immigration court and the BIA did not rest their finding on the interpretation now pressed by the INS. Indeed, the INS did not make this argument until *after* the court of appeals ruled in Elias-Zacarias's favor.

Perhaps most importantly, the statute is not ambiguous. As in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), traditional tools of statutory construction answer the interpretive question posed to this Court. The plain meaning of the text of the Refugee Act compels the conclusion that resistance to forced recruitment—resistance punishable by death—by an armed guerrilla faction in a civil war constitutes "persecution on account of . . . political opinion." In addition, unlike the situation in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), there is no suggestion in the statute or in the legislative history of the Act that Congress intended to delegate policy-making authority to the Executive Branch with respect to refugee admissions. To the contrary, Congress passed the Refugee Act to restrict the Executive Branch from relying upon policy-related reasons for

denying relief to refugees. The Act specifically sought to end an era of refugee admissions based on American foreign policy. Nothing remotely suggests that Congress intended to delegate to the Executive the authority to interpret narrowly and rigidly the provisions of the Refugee Act to limit the number of persons granted relief.

Finally, even assuming that the Board's interpretation comes within the purview of *Chevron*, it still should be reversed. In light of the statute, the agency involved, and the nature of the decision, the INS's interpretation—that resistance to guerrilla recruitment by a person who seeks to remain neutral in a raging civil war is not "persecution on account of . . . political opinion"—is unreasonable. Consequently, this Court should reject the INS's interpretation.

ARGUMENT

To be eligible for asylum, the applicant must establish a well-founded fear of "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988). The INS does not contest that Elias-Zacarias, who resisted forcible recruitment by guerrillas, has "a well-founded fear of physical injury or worse . . . ." Pet. Br. at 10. The INS also concedes, as it must, that the leftist guerrillas sought to conscript Elias-Zacarias to further political goals. *See* Pet. Br. at 10. Thus, the only dispute between the parties is whether a threat by an organized terrorist force bent on overthrowing a government, against someone who refuses to join its ranks, amounts to "persecution on account of . . . political opinion." The INS takes the untenable position that "the *persecutor's state of mind is determinative* of whether persecution is 'on account of' a political belief held by the victim." Pet. Br. at 9-10 (emphasis added).

I. THE BIA'S INTERPRETATION OF THE REFUGEE ACT IS NOT ENTITLED TO DEFERENCE

A. The BIA's Inconsistent Interpretations of the Statutory Language at Issue in This Case Are Entitled to Little, if Any, Deference.

This Court repeatedly has refused to defer to an agency determination that is part of an inconsistent line of decisions.[6] "As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (citation omitted). Deference is unwarranted when, as here, the agency departs from precedent without explanation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring) ("[T]he principles announced in an adjudication cannot be departed from in future adjudications without reason.").[7]

The INS alleges that, because the BIA "consistently" has concluded that forcible recruitment is not persecution on account of political opinion under the Refugee Act, the interpretation "merits deference." Pet. Br. at 24. To support this contention, the INS relies primarily on the Board's decisions in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1987), *modified, Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), in which Salvadoran nationals feared persecution based on resistance to military re-

---

[6] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989); *INS v. Cardoza-Fonseca*, 480 U.S. at 446 n.30. Indeed, some of the cases cited by the INS emphasize that deference is appropriate only when the agency's interpretation has been consistent. *See, e.g., EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

[7] *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 120 n.20 (1987); *Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1452 (D.C. Cir. 1988) (Starr, J.); *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) (Easterbrook, J.).

cruitment.[8] A close examination of these BIA decisions, as well as other significant opinions that the INS fails to cite, reveals that the various interpretations of "persecution on account of... political opinion" in forcible recruitment cases are fundamentally inconsistent. The Board has *never* consistently applied this, or any other standard to claims based on resistance to forcible recruitment.

1. Afghan Cases.

Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982), is the first time that the BIA addressed a claim for asylum and withholding of deportation based on refusal to serve in the military.[9] Salim fled Afghanistan after refusing to join the Soviet-backed Afghan army. The evidence offered by Salim in support of his asylum claim was testimony that he refused to join the army in its war against the rebels and that he feared persecution if deported there. *See id.* at 313. Finding that the Afghan army "resorts to dragooning and forcibly impressing into its forces men and boys," the BIA granted relief to Salim. *Id.*

Under *Salim's* lenient standard, Elias-Zacarias would be eligible for relief. As in this case, the BIA did not require that Salim meet *any* of the requirements that it later enumerated in *Matter of Acosta*. The BIA specifically did not require that Salim show

[8] The INS defines the multi-part *Acosta* test as follows: "The evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien ." Pet. Br. at 24-25 (*citing Matter of Acosta*, 19 I. & N. Dec. at 226; *Matter of Mogharrabi*, 19 I. & N. Dec. at 446).

[9] *Salim*, a decision left unmentioned by the INS, is the most frequently cited BIA opinion dealing with forcible recruitment, *see, e.g., Matter of Izatula*, Interim Dec. No. 3127 (BIA Feb. 6, 1990); *Matter of Canas*, 19 I. & N. Dec. 697, 709 n.11 (BIA 1988), *rev'd, Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), and was cited in the primary case relied upon by the INS, *Matter of Acosta*, 19 I. & N. Dec. at 214.

that he possessed a political opinion at odds with the Afghan military; the Afghan army was aware of Salim's opposition; and the Afghan army had the capability or the inclination to overcome Salim by means of punishment.[10]

Similarly, in *Matter of Izatula*, Interim Dec. No. 3127 (BIA Feb. 6, 1990), the BIA, as in *Salim*, granted asylum to an Afghan who feared persecution because he did not wish to serve in the army and because he had provided "assistance" to the mujahedin. The Board ruled that Izatula was not eligible for asylum based solely for refusal to perform military service "[s]ince the Soviet forces have withdrawn from Afghanistan...." *Id.* at 4. Nevertheless, the BIA granted Izatula asylum without reference to any of the *Acosta* requirements on the grounds that the government of Afghanistan is "illegitimate" and any punishment imposed for assisting the mujahedin would be illegitimate.[11] The BIA's decision in *Izatula* makes it clear that the Board does not require asylum applicants from Afghanistan to satisfy the stringent *Acosta* requirements.

2. Salvadoran and Guatemalan Cases.

In sharp contrast to the decisions on forcible recruitment involving nationals of Afghanistan, the BIA, as *Matter of Acosta* exemplifies, has erected nearly insurmountable barriers to similar claims by persons from El Salvador and Guatemala. First, the Board rejects asylum claims based solely on an applicant's credible testimony. Second, the Board implausibly presumes that persecution by guerrilla organizations has nonpolitical motiva-

[10] In 1985, the year the BIA decided *Matter of Acosta*, the BIA again granted political asylum and withholding of deportation to Afghan nationals resisting military conscription. *See In re Noory*, File No. A24-081-415 (BIA Oct. 28, 1985); *In re Momen*, File No. A27-026-208 (BIA Oct. 10, 1985). In neither case did the BIA apply the *Acosta* four-part test to determine eligibility for asylum.

[11] The Board's explicit reliance on the "illegitimate" nature of the government of Afghanistan, of course, is nearly certain to result in ideologically tainted decision-making. *See* Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 Int'l J. of Refugee L. 5, 17-18 (1991).

tions. Third, the Board places a heavy evidentiary burden on the applicant of establishing a political motive or intent to persecute. Finally, the Board does not distinguish between legitimate and illegitimate recruiters.

For example, in *Matter of Vigil*, 19 I. & N. Dec. 572 (BIA 1988), the Board denied a Salvadoran's asylum claim because he failed to support his claim based on resistance to forced guerrilla recruitment with a showing that physical retribution for refusing to join was triggered by his political opinions. *See id.* at 577-78 n.4. The BIA also rejected Vigil's claim that he would be persecuted if he refused to join the government army. *See id.* at 578. It held that when a "legitimate" government sanctions a person for resisting military service, it does not constitute persecution. *See id.* The Board did not consider whether punishment by the Salvadoran military, which has a questionable human rights record, constitutes a legitimate exercise of authority.

Similarly, in *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 511 (BIA 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989), the BIA denied asylum to a Salvadoran who had been kidnapped and forcibly recruited by leftist guerrillas and later deserted. Ignoring *Salim* and its progeny, the Board required Maldonado to overcome by a preponderance of the evidence the presumption that the guerrillas' persecution of him would be "nonpolitical" and ruled that the guerrillas' actions did not constitute persecution. *See id.* at 516.[12] The "nonpolitical motivations" presumption—not

[12] Maldonado-Cruz also claimed that forced participation in guerrilla operations would prompt government persecution on account of political opinions imputed to him. *See* 19 I. & N. Dec. at 511, 517-18. The Board held that the Salvadoran government "has a legitimate right to investigate and detain individuals suspected of aiding or being a member of [a guerrilla] organization." *Id.* at 518. The BIA never has applied that principle to the asylum claims of Afghans and Cubans. *See Matter of Sopena-Hernandez*, File No. A28-279-551 (BIA July 15, 1987) (granting withholding of deportation to Cuban who participated in organizations hostile to government); *Matter of Mohibi*, File No. A27-497-579 (BIA July 27, 1987) (granting asylum to Afghan fearing persecution due to membership in group opposed to government).

mentioned in *Acosta*—demonstrates that even *Acosta* fails to represent the BIA's consistent position on this question.

Put simply, in stark contradiction with its decisions involving asylum applicants from Afghanistan, the BIA requires Salvadorans and Guatemalans to submit evidence of their persecutors' intent or motive to persecute.

3. The Effects of the Inconsistencies.

This Court consistently has refused to defer to agency positions at odds with positions previously held by the agency. For example, in *Cardoza-Fonseca*, this Court declined to defer to the agency's position concerning the standard of proof applicable to asylum claims because of "the inconsistency of the positions the BIA has taken through the years." 480 U.S. at 446 n.30. In so doing, this Court concluded that the BIA's "long pattern of erratic treatment [in applying the standard of proof] make[s] it apparent that the BIA has not consistently agreed, and even today does not completely agree, with the INS's litigation position that the two standards are equivalent." *Id.*

The inconsistency in the BIA's treatment of asylum applicants fleeing forced recruitment warrants similar treatment. The INS takes a position before this Court that is completely at odds with the BIA decisions. It argues that "asylum eligibility under the Refugee Act does not turn on whether persecution is legitimately authorized. . . . No principled distinction can be drawn between persons recruited by guerrillas and persons conscripted by governments." Pet. Br. at 22. However, as the BIA's forcible recruitment decisions demonstrate, the agency has made precisely those types of distinctions. Because the Board has failed to apply consistent standards to applicants from different countries, this Court should not defer to the INS's current position in this case.

Moreover, deference is unwarranted for an interpretation put forward by an agency in litigation, without previously having been laid down in a form bearing the force of law. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212-13.[13] The INS has

[13] *See also Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 143-44 (1984); *St. Agnes Hosp. v. Sullivan*,

failed to offer a reasoned and consistent view of the "persecution on account of . . . political opinion" language in the Refugee Act. It instead proffers an interpretation inconsistent with its view of "the same statutory provision advocated in past cases." *See id.* Neither the immigration court's nor the BIA's rulings discuss, much less set forth, a reasoned and consistent view of the statutory language in question. Indeed, the INS failed to raise the interpretation advocated in this Court until after the court of appeals panel rejected its original arguments.

The inconsistency in the INS's interpretation of the Refugee Act demonstrates that it is merely a litigating position, not a reasoned and consistent interpretation of the statute. Because the INS's litigating position amounts to nothing more than a search for some rationale to reverse the ruling in favor of Elias-Zacarias, it does not deserve deference.

B. Because the BIA's Inconsistent Interpretations of the Statute Appear To Be Influenced by Impermissible Bias, This Court Should Not Defer to the Agency Interpretation in This Case.

The Executive Branch's inconsistent interpretation of the "persecution on account of . . . political opinion" language in the Refugee Act suggests a deeper flaw in the administrative decisionmaking process. Despite similar circumstances, the BIA consistently finds that natives of Afghanistan—a country with a government at odds in recent years with the United States government—fled political persecution, while natives of El Salvador and Guatemala—countries supported by the American government—did not. The nature of the inconsistency gives rise to an inference that the INS is biased against persons fleeing countries with governments supported by the United States. The Refugee Act, however, at a minimum bars foreign policy bias from

905 F.2d 1563, 1568 (D.C. Cir. 1990); *see also Church of Scientology v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (*en banc*), *aff'd*, 484 U.S. 9 (1987) (assuming that litigation position might be entitled to *Chevron* deference but concluding that "counsel's interpretation in fact does *not* explain agency action but is, to the contrary, incompatible with the agency's settled course of conduct") (emphasis in original).

influencing the determination of asylum eligibility.[14] Because the BIA's interpretation of the statute may have been influenced by bias prohibited by the statute, it is not entitled to deference.

The right to an unbiased decision-maker is essential to an impartial decision by an administrative agency.[15] When an agency appears to be impermissibly biased, careful scrutiny of the agency action, not deference, is warranted.[16] For example, in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), the Court reversed an agency decision made during President Reagan's administration to rescind a rule promulgated by a previous administration that would have required passive restraints in automobiles. The agency made that decision in the face of a statutory mandate to improve traffic safety. *See id.* at 33. Although the agency did not expressly rely on the administration's

[14] One of the issues before this Court in *INS v. Doherty*, 111 S. Ct. 950 (1991), is whether, *after* an applicant has established a well-founded fear of persecution on account of political opinion, *see* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988), the agency may consider foreign policy in exercising discretion to grant or deny asylum, *see* INA § 208, 8 U.S.C. § 1158. In this case, the BIA did not deny relief based on the discretion bestowed it by statute but instead concluded that Zacarias failed to establish a well-founded fear of persecution on account of political opinion.

[15] *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

[16] *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' ") (*quoting In re Murchison*, 349 U.S. 133, 136 (1955)); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 985 n.377 (1988) (stating that "court should, of course, withhold deference . . . when evidence indicates agency bias"); Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 371 (1986) (suggesting that deference to agency action may depend on "whether the agency can be trusted to give a properly balanced answer" to question).

support for deregulation,[17] the Court reviewed the decision with great care. *See id.* at 40-57.

In contrast, the Environmental Protection Agency's interpretation of the statute at issue in *Chevron* did not appear to be influenced by political considerations contrary to statutory mandate. The agency interpretation did not represent a departure from that of any previous administration. *See Chevron*, 467 U.S. at 840-42, 845-59. Nor were there any facts giving rise to an inference that impermissible bias influenced the agency's interpretation. Along with other reasons, the absence of any indication of bias in the decisionmaking process in *Chevron* favored deference to the interpretation.

This case is no different in principle from *State Farm*.[18] An asylum decision influenced by impermissible factors might result in the applicant's deportation to a country to face serious deprivations of life and liberty. *See Cardoza-Fonseca*, 480 U.S. at 449.[19] Consequently, it is particularly important for the agency adjudicating an asylum claim to be truly impartial. The BIA's inconsistent interpretation of identical language in the Refugee Act apparently depends on the nationality of the asylum applicant, *see supra* Section I(A), which suggests that the agency's interpretation has been influenced by United States foreign policy. The Refugee Act, however, was designed to remove foreign policy from the executive branch's asylum determinations. Indeed, one of Congress's basic objectives was to eliminate the "discrimina-

---

[17] *See generally* L. Gerston, C. Fraliegh & R. Schwab, *The Deregulated Society* (1988).

[18] For a discussion of the relevance of *State Farm* and *Chevron* to the judicial review of asylum decisions, see Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279.

[19] *See also Reyes-Arias v. INS*, 866 F.2d 500, 504 (D.C. Cir. 1989) (Starr, J.) (describing asylum as "most sensitive of human claims in the international community"). Because of the interests at stake, Judge Friendly viewed agency decisions concerning an alien's right to remain in this country as requiring stringent procedural protections. *See* Friendly, "*Some Kind of Hearing*", 123 U. Pa. L. Rev. 1267, 1296-97 (1975).

tory treatment of refugees by providing a new definition of refugee . . . ."[20] As required by international law, the Act removed ideological and geographical limitations on refugee eligibility. *See Cardoza-Fonseca*, 480 U.S. at 434-35; *INS v. Stevic*, 467 U.S. 407, 427 (1984). To that end, the Refugee Act removed provisions from the Immigration and Nationality Act that limited eligibility for relief to those fleeing Communist or Middle Eastern countries. *See* INA § 203(a)(7)(A)(i), 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed by Refugee Act § 203(b), 94 Stat. 102, 107 (1980)).

Indeed, the Attorney General, the INS, and the Department of State have conceded that "the fact that an individual is from a country whose government the United States supports or with which it has favorable relations *is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.*" *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (emphasis added).[21] The INS therefore cannot justify its various interpretations of "persecution on account of . . . political opinion" on the nationality of the asylum applicant.

When viewed in light of the overall pattern of the Executive Branch's asylum decisions, the appearance of foreign policy bias in this case becomes more troubling. Inconsistent interpretations

---

[20] S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979); *see* H.R. Rep. No. 608, 96th Cong. 2d Sess. 13 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 141 (stating that, under the Refugee Act, the "plight of the refugees themselves, as opposed to national origin or political considerations, should be paramount in determining which refugees are to be admitted to the United States"); *see also* Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1262 n.39 (1990) ("Congress intended the refugee standards to be applied neutrally and without ideological bias.") (citations omitted).

[21] In making that concession, the Executive Branch settled a lawsuit in which a class of Salvadorans and Guatemalans claimed discriminatory treatment in the asylum process. The settlement afforded class members the opportunity to reapply for asylum. *See* 760 F. Supp. at 799.

of the Refugee Act by the BIA based on the applicant's nationality exist in a number of instances.[22] Despite the mandate of the Act, the Executive's asylum decisions correlate closely to the United States' foreign policy agenda.[23] A report of the United States General Accounting Office showed that, despite little apparent difference in country conditions, those who fled countries not on the best of terms in the early 1980s with the United States government, such as Afghanistan, China, Cuba, Poland, and Iran were granted asylum with much greater frequency than those from regimes supported by the United States, such as El Salvador, Guatemala, and Haiti. *See* United States General Accounting Office, *Asylum: Uniform Application of Standards Uncertain—Few Denied Applicants Deported*, 22, 42 (1987).[24]

---

[22] *See* Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681, 711-19, 712 n.145 (1989); *see also* Yarnold, *Administrative Policymaking: Adjudication by the Board of Immigration Appeals in Asylum-Related Appeals 1980-87*, 9 Pol'y Stud. Rev. 681, 686 (1990) (statistical analysis of BIA decisions concluding that "[a]liens from hostile states were more likely to prevail in asylum-related appeals to the BIA than aliens from nonhostile states").

[23] *See* N. Zucker & N. Zucker, *The Guarded Gates: The Reality of American Refugee Policy* 140-76 (1987); G. Loescher & J. Scanlan, *Calculated Kindness: Refugee and America's Half-Open Door, 1945 to the Present* (1986); Johnson, *supra*; *Note, Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495 (1986). As former Chairman of the House Subcommittee on Immigration, Refugees and International Law Romano Mazzoli bluntly observed: "The Refugee Act of 1980 was intended to eliminate ideology and geography as the controlling factors in our refugee admission program. We seem not to have accomplished this most important objective." 131 Cong. Rec. H9308 (daily ed. Oct. 29, 1985) (letter from Romano L. Mazzoli to President Reagan dated Sept. 27, 1985).

[24] For example, the report found that, for calendar year 1984, the agency denied the asylum claims of 98% of the Salvadoran applicants compared to 51% of the Polish applicants. *See* United States General Accounting Office, *supra*, at 15-16.

The nature of the administrative system that adjudicates asylum claims further supports the inference that foreign policy enters the process. One would expect the Department of State, which may provide advisory opinions on every asylum claim, *see* 8 C.F.R. §§ 208.4(a), 208.11(a), 236.3(b) (1991),[25] to place a premium on the foreign policy impact of its opinions, *see* Martin, *supra*, at 1331-34. The General Accounting Office report showed that agency's final asylum determinations agreed with the State Department's opinion *96%* of the time. *See* United States General Accounting Office, *supra*, at 22-23.

Another clear example of the foreign policy tilt to the Executive's asylum decisions is the fluctuating treatment of Nicaraguans depending on the United States government's changing foreign policy toward the Nicaraguan government. Although the percentage of Salvadorans granted asylum remained consistently low in the 1980s as United States foreign policy toward that country remained constant, the success rate for Nicaraguan applicants varied dramatically depending on the shifting foreign policy toward Nicaragua.[26] Indeed, Attorney General Meese, as part of a diplomatic attack on the Sandinista government, directed the INS to encourage Nicaraguans to apply for asylum.[27]

---

[25] The State Department letters traditionally appeared to be little more than form letters simply stating conclusions without analysis. *See, e.g., Balazoski v. INS*, 932 F.2d 638, 642-43 n.2 (7th Cir. 1991); *Montecino v. INS*, 915 F.2d 518, 521 n.1 (9th Cir. 1990).

[26] *See* H.R. Rep. No. 244, 101st Cong., 1st Sess., pt. 2, at 4 (1989). For the period June 1983 to September 1988, the INS District Directors' approval rate of asylum applications for Nicaraguans was 27.9% compared to 2-3% for Salvadoran and Guatemalans. *See Central American Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 70 (1989). In fiscal year 1988 alone, the approval rate was 53.19 % for Nicaraguans compared to 2.79 for Salvadorans and 5% for Guatemalans. *See id.*

[27] *See* Department of Justice, Press Release (July 8, 1987), *reprinted in Central America Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 70 (1989).

As the disparate treatment in the forcible recuitment cases suggests, foreign policy appears to have a silent influence on the BIA's asylum decisions. As the United States Court of Appeals for the Second Circuit noted in reversing the BIA's denial of asylum to a Salvadoran, "[w]hen it appears, as here, that extraneous influences—not appearing in the record—may have determined the outcome of an administrative proceeding, expending judicial effort in an attempt to analyze the record is an exercise in futility, because the administrative proceeding in such case would simply be a charade." *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 219 (2d Cir. 1991).[28]

In this case, the INS's interpretation of the "on account . . . of political opinion" language of the Refugee Act appears to have been influenced by the Executive Branch's foreign policy goals. Such bias, however, is prohibited by the Refugee Act. Nothing in the Act remotely suggests that Congress sought for asylum to be another foreign policy tool for the Executive Branch. Consequently, this Court should not defer but instead should review carefully the agency's interpretation at issue in this case.[29] Elias-Zacarias, unwilling to participate with terrorists in the armed

---

[28] *See M.A. v. United States INS*, 899 F.2d 304, 319 (4th Cir. 1990) (*en banc*) (Winter, J. dissenting) (noting that foreign policy "politicization of the asylum process . . . suggests that heightened deference to the Board is unwarranted"); *see also* Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252, 235 (1990) (empirical study of two years of adjudication in immigration court concluding that "ideological preference . . . and uninvestigated political judgments . . . continue to influence the decision-making process"). For a thorough empirical study examining, among other things, ideological bias in asylum proceedings in the immigration court, see Anker, *Determining Asylum Claims in the United States: An Empirical Case Study*, 19 N.Y.U. Rev L. & Soc. Change ____ (forthcoming).

[29] Because this case involves inconsistent interpretations of a statute by the agency apparently based on the applicant's nationality, this Court need not address the question of whether all of the Executive's asylum decisions should receive careful scrutiny to guard against potential bias.

conflict in Guatemala, should not have the disposition of his asylum application subject to the vagaries of broad foreign policy concerns.

C. The Plain Meaning of the Statute Compels the Conclusion that an Individual Threatened with Violence by Leftist Guerrillas for Refusing To Join Their Ranks Has Been Persecuted on Account of Political Opinion.

The INS argues that the BIA's interpretation of "persecution on account of . . . political opinion" is entitled to deference under *Chevron*. *See* Pet. Br. at 23.[30] This Court, however, repeatedly has emphasized that courts should defer to an agency's interpretation of law only when the statute is ambiguous.[31] To determine whether the statute is ambiguous, the Court looks to traditional tools of statutory construction,[32] including " 'the particular statutory language at issue, as well as the language and design of the statute as a whole.' " *Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043, 2046 (1990) (citation omitted). Because the plain meaning of the Refugee Act leads to the inexorable conclusion that a death threat by a communist military force constitutes persecution on account of political opinion, the INS's construction of the statute is not entitled to deference.

An administrative agency is bound by the "ordinary and obvious meaning" of the statutory language. *Cardoza-Fonseca*, 480 U.S. at 431 (citations omitted). The INS argues that when a

---

[30] In arguing for deference to the agency's interpretation, the INS correctly does not rely upon the plenary power doctrine. This Court traditionally has applied that doctrine only to narrow the review of laws enacted by *Congress*, not legal interpretations of the *Executive*. *See, e.g., Fiallo v. Bell*, 430 U.S. 787 (1977); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

[31] *See, e.g., Sullivan v. Everhart*, 110 S. Ct. 960, 964 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U .S. 281, 291 (1988); *Chevron*, 467 U.S. at 843.

[32] *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2677 (1990); *Cardoza-Fonseca*, 480 U.S. at 446-48; *Chevron*, 467 U .S. at 843 n.9.

politically-motivated terrorist organization persecutes an individual for refusing to join, it is not "persecution on account of . . . political opinion." *See* Pet. Br. at 9-10. The INS's sterile construction conflicts with the phrase's ordinary and obvious meaning. A personal, face-to-face threat by guerrillas armed with machine guns under any rational definition constitutes persecution on account of political opinion.

Claiming that its interpretation is entitled to deference, the INS strains to make a clear statute ambiguous. The INS argues that, because guerrillas are unconcerned with the political views of those they seek to recruit, the kidnapping or murder of those who refuse to join them fails to qualify as "persecution on account of . . . political opinion." *See* Pet. Br. at 27-30. Yet it is precisely Elias-Zacarias's refusal to join that the leftist guerrillas perceive as a political act that triggers retribution in the form of the most serious deprivations of life and liberty. Refusing to join a political organization clearly is a political choice.[33] When someone resists recruitment by a military force, that force correctly imputes a political opinion to that person.[34] For that reason, persecution by a politically motivated organization presumptively is "persecution on account of . . . political opinion." *See Platero-Cortez v. INS*,

---

[33] "Just as a nation's decision to remain neutral is a political one, *see, e.g.*, Neutrality Act of 1939, 22 U.S.C. §§ 441-465 . . . , so is an individual's." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984); *see also* Aleinikoff, *supra*, at 14 ("[P]ersons living in a war-torn nation ought to be able to decide whether to fight and which side to join, and their murder (either by guerrillas or government death squads) because of their decision to opt out is *a gross violation of human rights*.") (emphasis added).

[34] *See, e.g., Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). The INS quotes a portion of the UN Handbook that supports this point. *See* Pet. Br. at 25 n.9. The Handbook states that political opinion may include one "attributed by [the persecutors] to the applicant." *See* Office of the United Nations High Commissioner For Refugees, *Handbook On Procedures And Criteria For Determining Refugee Status* ¶ 80 (Geneva 1979) (hereinafter *UN Handbook*).

804 F.2d 1127, 1131 (9th Cir. 1985). Under these circumstances, that is the only rational conclusion.[35]

Moreover, by requiring concrete evidence of a persecutor's perhaps irrational state of mind, the INS's interpretation would place a crushing evidentiary burden on asylum applicants. Asylum applicants must establish a likelihood of persecution based on events that occurred thousands of miles away with scant documentary evidence and few witnesses present in this country to corroborate their claims.[36] Evidence of the motives of terrorists is rarely available. By requiring asylum applicants to demonstrate the precise motivation of their persecutors and by creating the unfounded presumption that the violent acts of revolutionary groups do not constitute persecution on account of political opinion, the INS would place an almost insurmountable obstacle in the paths of those victimized by such lawless terrorism.[37] The INS's position would defeat the claims of those, like Elias-Zacarias, who legitimately fear serious deprivations of life and liberty because of their refusal to join terrorist organizations.[38] By

---

[35] As one court of appeals observed,

> The guerrillas . . . do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.

Bolanos-Hernandez v. INS, 767 F.2d at 1287.

[36] *See UN Handbook, supra*, ¶ 95-205; Martin, *supra*, 1280-87.

[37] Consequently, the interpretation clearly conflicts with the principles that the evidentiary requirements placed on asylum applicants "should . . . not be too strictly applied" and that the applicant should receive the benefit of the doubt. *UN Handbook* ¶¶ 197, 203, at 47-48. This Court has concluded that the *UN Handbook* "provides significant guidance in construing the [relevant treaties], to which Congress sought to conform." *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

[38] *See* Aleinikoff, *supra*, at 8 (stating that BIA's position in forced recruitment case of Salvadorans may require deportation to country where they are "quite likely to suffer severe harm"). Indeed, the INS itself suggests that those who fled the massive political and racial

requiring concrete evidence of the persecutor's state of mind, the agency's interpretation is at odds with this Court's suggestion in *Cardoza-Fonseca* that a mere ten percent chance of persecution might satisfy the well-founded fear standard. See *Cardoza-Fonseca*, 480 U.S. at 431, 440.

The INS supports its novel legal interpretation by selective citation to legislative history that suggests that Congress did not intend the Refugee Act to provide relief to "displaced persons." *See* Pet. Br. at 17-19. However, Elias-Zacarias is not simply a "displaced person" fleeing a civil war. Rather, he received a direct threat from masked guerrillas armed with machine guns.

This case in many ways resembles *INS v. Cardoza-Fonseca*. As in that case, the interpretive question before this Court is "well within the province of the judiciary." 480 U.S. at 448. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 446-48; *see Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (reviewing agency interpretation as "a purely legal question of statutory interpretation"). Relying upon the statutory language, the legislative history, and the relevant treaties, the Court in *Cardoza-Fonseca* found "these ordinary canons of statutory construction compelling." 480 U.S. at 449. The Court therefore declined to defer to the INS's interpretation.

As in *Cardoza-Fonseca*, this Court consistently has rejected agency interpretations contrary to the mandate of Congress.[39] The Court should do the same in this case. Because the ordinary and obvious meaning of the statute is contrary to the INS's interpretation, it does not fall within the ambit of *Chevron*.[40]

---

persecution of Idi Amin in Uganda would not have been eligible for asylum under its interpretation of the statute. *See* Pet. Br. at 19 n.6.

[39] *See, e.g., Dole v. United Steelworkers*, 110 S. Ct. 929, 938 (1990); *Sullivan v. Zebley*, 110 S. Ct. 885, 894-97 (1990).

[40] The Eleventh Circuit, in a *per curiam* opinion, *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990) (*per curiam*), improperly deferred to the BIA's conclusion that the guerrillas' threats against a deserter were insufficient to constitute persecution on

D. Because Congress Unambiguously Intended to Limit the Policy-Making Authority of the Executive Branch with Respect to Determining Eligibility for Asylum, the INS's Policy Justifications for Its Interpretation Must Be Rejected.

Chevron deference allows Congress to delegate policy decisions to administrative agencies with the expertise to best make the necessary judgments. *See Pauley*, 111 S. Ct. at 4782 (*citing* Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2085-88 (1990)).[41] However, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co., Inc. v. Barrett*, 110 S. Ct. 1384, 1390 (1990).[42] Conversely, when Congress chooses not to delegate policymaking authority to an administrative agency, the courts should not defer to an attempt by the agency to usurp such authority. The legislative history of the Refugee Act is clear that Congress passed the Act to *limit* the policymaking authority of the Executive Branch with respect to asylum determinations. Because the INS's interpretation therefore is based on an imper-

---

account of political opinion. The court deferred without examining the statutory language or legislative history, without discussing the Board's inconsistent positions, without considering possible bias, and without examining whether the Board's interpretation was reasonable. What is more, it expressed confusion over the proper standard of review. *See id.* at 1296 ("Where the resolution of this matter involves a question of statutory interpretation, we review the BIA's decision *de novo*. We are also obliged, however, to defer to the BIA's interpretation of the applicable statute if that interpretation is reasonable.") (citations omitted).

[41] *Chevron* itself involved the highly technical issue of whether states could treat an industrial grouping as a single "stationary source" under the Clean Air Act Amendments of 1977. *See Chevron*, 467 U.S. at 840; *see also* Sunstein, *supra*, at 2096 ("[I]t is difficult to quarrel with the proposition that courts should defer when, and only when, agencies have a comparative advantage.").

[42] *See Pauley*, 111 S. Ct. at 2534; *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1235 (1991); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 208.

missible usurpation of policymaking authority, it is entitled to little, if any, deference.

In stark contrast to the cases in which this Court ordinarily employs *Chevron* deference,[43] Congress passed the Refugee Act to limit the policymaking authority of the Executive in refugee matters. Until Congress passed the Act, the United States had no formal procedure for granting asylum and the Executive Branch had near complete discretion over the refugee admission. *See generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 San Diego L. Rev. 9 (1981). The Executive's refugee admissions followed a clear pattern. Refugees from countries perceived as hostile to the United States, particularly those who fled communist nations, were admitted much more frequently than refugees fleeing persecution in countries with governments on good terms with the United States government. *See* Anker & Posner, *supra,* at 16-20; Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise,* 17 U. Mich. J.L. Ref. 243, 246 (1984).

To implement the treaty obligations of the United States,[44] Congress passed the Refugee Act, which sharply curtailed the executive branch's discretion, removed foreign policy considera-

---

[43] *See, e.g., Fort Stewart Schools v. FLRA,* 110 S. Ct. at 2043 (statute delegating authority to establish policies and provide guidance); *Sullivan v. Everhart,* 110 S. Ct. at 963 (statute delegating authority to promulgate regulations establishing procedures to implement statute).

[44] In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967) (hereinafter "UN Protocol"), defining "refugee" in nonideological terms and obligating the United States to implement its refugee policy without regard to political considerations. Article 3 of the United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137 (1951) (hereinafter "UN Convention"), incorporated into the UN Protocol in Article I(10), requires that "Contracting States . . . apply the provisions of this Convention to refugees without discrimination as to race, religion or *country of origin.*" (emphasis added). Article 3 was so central that, unlike other provisions, nations could not ratify the treaty with reservation to that provision. *See* U.N. Convention Art. 42; U.N. Protocol Art. VII(1).

tions from refugee admissions, and provided congressional control over the asylum process. Congress intended to leave no gap for agency policymaking in its definition of refugee. The term "refugee" is clearly defined by the statute in an ideologically and geographically neutral fashion. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). That definition of "refugee" requires no specialized, technical knowledge, only a respect for ordinary principles of statutory construction, well within the competence of the courts. Consequently, this Court has carefully reviewed the BIA's interpretation of the Refugee Act. *See Cardoza-Fonseca,* 480 U.S. at 421.

The Refugee Act sought to exert congressional control over the asylum process in a number of other ways as well. Congress required the Attorney General to establish a standard, uniform procedure for applying for asylum. *See* INA § 208(a), 8 U.S.C. § 1158(a) (1988). Congress also required annual consultation between the President and Congress on refugee admission quotas and emergency refugee initiatives. *See* INA § 207, 8 U.S.C. § 1157. Finally, Congress amended the withholding of deportation provision to make relief mandatory when the applicant has established a clear probability of persecution. *See* INA § 243(h), 8 U.S.C. § 1253(h); *INS v. Stevic,* 467 U.S. at 421-25.

In short, Congress passed the Refugee Act to limit the executive branch's ability to weigh policy concerns and to ensure that refugees were to be treated in a fair and ideologically neutral manner. To read the statute as granting policymaking authority and requiring deference to the BIA's interpretation of the statutory definition of refugee is to disregard clear congressional intent.

Nonetheless, the INS asks this Court to allow it to interpret the statute to further policy considerations not permitted by Congress. The INS in effect admits that it proffers a narrow construction of the "persecution on account of . . . political opinion" language because it fears a "flood" of asylum claims. *See* Pet. App. 20. Congress, however, did not provide that such a policy consideration might be weighed in determining whether an asylum applicant established a well-founded fear of persecution on account of political opinion. Nor did Congress explicitly or implicitly delegate the authority to the agency to weigh such policy concerns. As

in *Cardoza-Fonseca*, the INS seeks to stringently limit the number of persons eligible for asylum.[45] The Refugee Act, however, simply does not allow such policy considerations to influence the determination of refugee eligibility.

When logically carried forward, the INS's interpretation has some startling ramifications. Few would suggest that, assuming the Refugee Act was law during the time of Nazi Germany, the flight of millions of Jews from the horrors of a Holocaust would entitle the INS to narrowly define "refugee" so that few Jews could qualify for relief. Such broad-based policy judgments affecting the *lives* of persons were precisely what Congress hoped to end by passing the Refugee Act.[46]

II. IN ANY EVENT, THE BIA'S INTERPRETATION OF THE STATUTORY LANGUAGE IN QUESTION IS UNREASONABLE

Assuming *arguendo* that the INS surmounts the many formidable barriers to *Chevron* deference, the BIA's interpretation must still be "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. A court may not substitute its construction of a statutory provision for a reasonable interpretation made by the agency. *See Chevron*, 467 U.S. at 844. Assuming that the Refugee Act implicitly delegates power to the INS to interpret the "persecution on account of . . . political opinion" language, this Court still must determine whether the agency's interpretation is reasonable. *See* Diver, *Statutory Interpretation in*

---

[45] *See Cardoza-Fonseca*, 480 U.S. at 452 (Blackmun, J., concurring) ("The efforts [of the lower courts in interpreting the Refugee Act] stand in stark contrast to—but, it is sad to say, alone cannot make up for —the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care").

[46] The legislative history of the Refugee Act states that it was "consistent with this country's traditions of welcoming the oppressed of other nations and with our obligations under international law. . . ." H.R. Rep. No. 608, 96th Cong., 2d Sess. at 17-18. Congress intended the Refugee Act to effectuate the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (1980).

the Administrative State, 133 U. Pa. L. Rev. 549, 569 (1988) ("Courts retain the authority to control administrative abuses of power; deferential review simply recasts the question of law as whether the agency's interpretation is 'reasonable.' ") (citation omitted).

To determine whether the agency's interpretation is reasonable, the court first must consider "the language, policies and legislative history of the Act. . . ." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).[47] To be reasonable, the agency interpretation must not be "contrary to clear congressional intent," *Chevron*, 467 U.S. at 843 n.9, as revealed by "the legislative history or the purpose and structure of the statute," *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985).[48]

In this case, the text, structure, purpose, and legislative history of the Refugee Act would be frustrated by the INS's unreasonable interpretation of the "persecution on account of . . . political opinion" language.[49] The INS's unduly stringent interpretation of

---

[47] *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. at 123 (suggesting that "reasonable" interpretation is one that is "rational and consistent with the statute"); *Continental Air Lines*, 843 F.2d at 1449 (Starr, J.) ("[R]easonableness in this context is to be determined by reference both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that inquiry with the Congressional purposes informing the measure."). *See generally* Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 27-30 (1990).

[48] *See, e.g., FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363-64 (D.C. Cir. 1985) (holding that agency interpretation was unreasonable as contrary to statutory purposes).

[49] *See* Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987) (arguing that, in deciding on proper standard of judicial review, court should consider statute, agency, and nature of decision); Johnson, *supra* (arguing that statute, agency, and nature of Branch decision warrant "hard look" review of the Executive's asylum decisions).

the "on account of . . . political opinion" language in effect would mean that, unless able to perform the virtually impossible by verifying the precise motive of their persecutors, all people fleeing forced conscription by totalitarian revolutionaries in countries supported by the United States government are *per se* ineligible for asylum. *See supra* Section I(A). The meaning of the statute is clear and the INS's position is unreasonable. *See supra* Section I(C).

Moreover, by passing the Refugee Act, Congress clearly intended to eliminate ideological and geographical restrictions on asylum and to treat refugees in a humanitarian fashion. *See supra* Section I(B), (D). To that end, Congress created the statutory right to apply for asylum, bound the Executive to the well-founded fear of persecution standard, and transformed withholding of deportation from a discretionary to a mandatory form of relief. *See id.* Applying lenient standards to nationals of Afghanistan, but requiring asylum applicants from El Salvador and Guatemala to meet a heavy evidentiary burden—by offering proof of the intent and motive of their persecutors—is contrary to each of those changes in the law.

In addition, the variations in the agency's interpretations of the same statutory language illustrates the unreasonableness of the INS's interpretation in this case. The only colorable explanation for the INS's radically inconsistent interpretations appears to be the nationality of the applicant. *See supra* Section I(B). That bias, which appears to rest on the foreign policy implications of granting asylum to an applicant from a country allied with the United States, violates a central tenet of the Refugee Act.

Agency interpretations must be the product of reasoned decisionmaking, including an explanation of its reasoning, to be deemed reasonable.[50] In this case, the immigration court and the BIA did not even rest their decisions on the "persecution on

[50] *See State Farm*, 463 U.S. at 57 ("[A]n agency changing its course must supply a reasoned analysis. . . .") (citation omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained").

account of . . . political opinion" language in the Refugee Act, much less adopt the interpretation that the INS now urges upon this Court. *See supra* I(A). This falls far short of reasoned decisionmaking. *See Bowen*, 488 U.S. at 213.

A final factor for consideration in evaluating the reasonableness of the agency's interpretation is the nature of the decision. Without question, the Executive Branch's asylum decisions implicate important life and liberty interests. As this Court has observed: "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."[51] Because the INS's narrow interpretation would make it impossible for many who legitimately fear serious deprivations of life and liberty to establish eligibility for asylum, it is not reasonable. Indeed, it is contrary to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449 (*citing INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

[51] *Cardoza-Fonseca*, 480 U.S. at 449; *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile.") (citation omitted); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss 'of all that makes life worth living.' ") (citation omitted).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* American Immigration Lawyers Association respectfully submits that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

KEVIN R. JOHNSON*
KING HALL SCHOOL OF LAW
UNIVERSITY OF CALIFORNIA AT DAVIS
Davis, California 95616
Telephone: (916) 752-8047

ROBERT B. HAWK
JOSHUA R. FLOUM
SERGIO GARCIA-RODRIGUEZ
ANNA S. MCLEAN
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, CA 94104-2878
Telephone: (415) 772-6000

ROBERT RUBIN
SARA CAMPOS
SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS
301 Mission Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444

Counsel For Amicus Curiae

**Counsel of Record*

August 14, 1991

(7)

No. 90-1342

Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

JAIRO JONATHAN ELIAS ZACARIAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF RESPONDENT

COVINGTON & BURLING
O. THOMAS JOHNSON, JR.
ANDREW I. SCHOENHOLTZ
T. MARK LANGE

ARTHUR C. HELTON*
330 Seventh Avenue
10th Floor
New York, New York 10001
(212) 629-6170

Of Counsel:

SAMUEL RABINOVE

Attorneys for *Amici Curiae*

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE INTERNATIONAL REFUGEE DEFINITION INCLUDES THOSE WHO OBJECT TO MILITARY SERVICE FOR REASONS OF CONSCIENCE AND THOSE WHO MIGHT SUFFER DISPROPORTIONATELY SEVERE PUNISHMENT FOR REFUSING TO SERVE 5

A. Conscription That Disregards an Individual's Genuine Convictions Can Provide the Basis of an Asylum Claim, Regardless of the Persecutor's State of Mind 6

B. An Individual May Be Persecuted "On Account of" Political Beliefs If He Faces Disproportionately Severe Punishment For an Offense 13

II. STATE PRACTICE SHOULD BE GIVEN CONSIDERABLE WEIGHT IN THE INTERPRETATION OF THE CONVENTION AND THE PROTOCOL 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

United States Authorities

a. Case Law

Air France v. *Saks*, 470 U.S. 392 (1985) 20,21
Benjamins v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) . 20
Choctaw Nation of Indians v. *United States*, 318 U.S. 423 (1943) 20
Eastern Airlines, Inc. v. *Floyd*, 111 S. Ct. 1489 (1991) 20,21
Immigration and Naturalization Service v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 3,7,19
Matter of A-G-, 19 I&N Dec. 502 (BIA 1987), rev'd, M.A. v. *U.S. I.N.S.*, 858 F.2d 210 (4th Cir. 1988), *rev'd, M.A.* v. *U.S. I.N.S.*, 899 F.2d 304 (4th Cir. 1990) (en banc) 4,8,13

b. Statutes

Immigration and Nationality Act, 8 U.S.C. §1101(a)(42)(A) (1991) 4
Refugee Act of 1980, Pub.L.No. 96-212, 94 Stat. 102 *et seq* 3

Page

Miscellaneous

Congressional Research Service, 98th Cong., 2d Sess., S. Pr. No. 98-205, *Treaties and Other International Agreements: The Role of the United States Senate* (1984) 20
Restatement (Third) of the Foreign Relations Law of the United States 20

International Treaties

Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 . . . . . *passim*
International Convenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967) 18
Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 . . . . . *passim*
Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (May 23, 1969) 20
Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929) 21

United Nations Authorities

Executive Committee Conclusions No. 8 (XXVIII), Report of the 28th Session of the Executive Committee of the High Commissioner's Program, UN Doc. A/AC. 96/549 (1977) 7
U.N. General Assembly Res. 428(V) 1950, Annex: Statute of the Office of the United Nations High Commissioner for Refugees 19

Page

UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) . . . . . *passim*
Universal Declaration of Human Rights, U.N. General Assembly Resolution 217A (III), 10 Dec. 1948 6

Australian Authorities

Chan v. *Minister for Immigration and Ethnic Affairs*, 87 A.L.R. 412 (1989) 21

Austrian Authorities

Federal Ministry of the Interior Regulation No. 22.501/4/-II/C/75 (June 4, 1975) 12

Canadian Authorities

a. Case Law

Abarca, Jorge Ardon v. *Ministry of Employment and Immigration*, IAB No. W86-4030-W (Mar. 21, 1986) 14
CRDD No. M89-00149 (Feb. 20, 1989) 17
CRDD No. T89-01610 (July 1989) 16
CRDD No. T89-01690 (Jan. 8, 1990) 15
CRDD No. T89-05407 (May 31, 1990) 15
CRDD No. V89-00924 (June 8, 1990) 15,16
Hilo v. *Canada*, [1991] F.C.J. No. 228 (C.A. March 15, 1991) 16
Musial v. *M.E.I.*, [1982] 1 F.C. 290, 38 N.R. 55 (C.A.) 15

Page

Padilla v. *Canada*, [1991] F.C.J. No. 71 (C.A., Jan. 31, 1991) 15
Ramirez, Louis Alberto Mena v. *Minister of Employment and Immigration*, IAB No. 86-6161 (May 5, 1987) . . . 9

b. Statutes

The Immigration Act, R.S.C. 9,10

German Authorities

Bayer.VG (AN 19 K 87.35820) (June 23, 1988), Bavarian Administrative Court, Ansbach 18
BVerwG IC 41.60 (29 June 1962), Federal Administrative Court, Berlin 12
Decision No. 438-01986-88 of the Federal Office for the Recognition of Foreign Refugees (Aug. 3, 1988) . . . 18
Decision No. 438-01318-86 of the Federal Office for the Recognition of Foreign Refugees (Aug. 3, 1988) . . . 18

United Kingdom Authorities

a. Case Law

Atibo v. *Immigration Officer*, [1978] Imm AR 93 (Feb. 28, 1978) 19
Doonetas v. *Secretary of State*, No. TH/12339/75 (820) (Oct. 14, 1976) 11
P.P. Matkov v. *Secretary of State for the Home Department*, No. TH/106300/83 (3331) (July 19, 1984) 11,17

Page

R v. *Secretary of the State for the Home Department, ex parte Zia Mehmet Binbasi*, [1989] Imm AR 595 (July 25, 1989) 17
Regina v. *Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 2 W.L.R. 92, 1 All E.R. 193 21

b. Regulations

Immigration Rules 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1342

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICI CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS THE AMERICAN JEWISH COMMITTEE

INTEREST OF THE *AMICI*

Amici curiae, the Lawyers Committee for Human Rights and the American Jewish Committee, offer this brief in support of respondent Jairo Jonathan Elias Zacarias, with the consent of the parties.

The Lawyers Committee for Human Rights (LCHR) is a national legal resource center working in the area of human rights, refugee and asylum law. In 1980, after the enactment of the

Refugee Act, the Committee created a national Refugee Project to monitor proposed legislation and regulations, to litigate significant cases regarding refugees and asylum, and to assist in providing legal representation for applicants for political asylum.

In the representation area, LCHR's Refugee Project uses volunteer lawyers to represent deserving persons who seek asylum irrespective of their nationality. Aside from its program in New York City, which provides assistance to over 200 individuals each year, LCHR works nationally to encourage and support private bar involvement in the asylum area. Since 1982, the Refugee Project has trained and provided practice materials to over 2,500 volunteer lawyers who represent indigent asylum applicants from around the world. In recognition of the unique need of asylum seekers for the effective assistance of counsel, and the interest of the private bar in meeting those needs, the Refugee Project has helped to organize and support volunteer lawyer programs to represent asylum applicants in Boston, New York, Miami, New Orleans, Houston, San Diego and Los Angeles. LCHR believes that the resolution of this case may affect numerous applications for protection under the Refugee Act.

The American Jewish Committee (AJC) is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. Since all American Jews are either immigrants or descendants of immigrants, if not refugees or descendants of refugees, AJC has always supported generous interpretations of immigration and refugee laws and policies. Through the years, therefore, AJC has joined with other *amici curiae* in numerous cases involving such issues before this Court. The case at bar affords AJC an opportunity to do so once again.

SUMMARY OF ARGUMENT

Petitioner claims that under the 1980 Refugee Act, persecution "on account of" an applicant's race, religion, nationality, membership in a particular social group or political opinion can only occur where the persecutor specifically intends to harm the asylum applicant because of the applicant's opinion or characteristic. Petitioner asserts that "[t]he asylum applicant may 'express[]' a political opinion, but if the persecutor's disagreement with that opinion did not in fact cause the persecution, then the persecution is not 'on account of * * * political opinion.'" Pet. Brief 14. In this brief, *amici* will show that Petitioner's argument proves too much, and that Petitioner is attempting to persuade the Court to adopt an interpretation of the refugee definition that does not comport with international standards.

Amici will demonstrate that, in fact, the international refugee definition, which the 1980 Refugee Act tracks virtually verbatim, has been interpreted more broadly in two fundamental ways by the Office of the United Nations High Commissioner for Refugees (UNHCR) and by various signatories — Canada, the United Kingdom, Germany, and Austria — to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1951 Convention and 1967 Protocol).[1] First,

---

[1] July 28, 1951, 189 U.N.T.S. 150; Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. In 1968, the United States acceded to the 1967 Protocol. In passing the 1980 Refugee Act, Pub.L.No. 96-212, 94 Stat. 102 *et seq.*, Congress intended to conform United States domestic law with its international obligations under the 1967 Protocol and directed that it should be interpreted consistently with that international instrument. *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). The language chosen by Congress in 1980 to define "refugee" is practically identical to the corresponding provisions of the 1967 Protocol. *Cardoza-Fonseca*, 480 U.S. at 437.

persecution "for reasons of"[2] religious, moral or political opinion may exist "when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience." UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (*Handbook*) (1979) ¶ 170. Second, "[a] deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offense on account of his" opinion or characteristic. *Id.* at ¶ 169. In such circumstances, proof of a persecutor's motivation is not singularly determinative, as Petitioner suggests.[3]

In sum, this brief does not argue that all draft evaders may be refugees. It does maintain, however, that in a world where armies and guerrillas engage in inhuman conduct and threaten the lives of persons who resist forcible recruitment, certain military resisters deserve international protection as refugees. In particular, the international refugee definition covers (1) those who may be

---

[2] As this brief focuses on the application of the international refugee definition by UNHCR and various signatories of the 1951 Convention and 1967 Protocol, we generally refer to the treaty language. The language of the 1980 Refugee Act at issue, "on account of," is virtually equivalent to the language of the 1951 Convention, "for reasons of." Compare Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1991), with 189 U.N.T.S. 152.

[3] The Board of Immigration Appeals (BIA) of the United States Department of Justice disagrees with Petitioner's claim in a similar way. Citing the *Handbook*, the BIA has held that persecution exists where an asylum applicant would be required to engage in inhuman conduct as a result of military service required by the government. *Matter of A-G-*, 19 I&N Dec. 502, 506 (1987), *rev'd, M.A.* v. *U.S. I.N.S.*, 858 F.2d 210 (4th Cir. 1988), *rev'd, M.A.* v. *U.S. I.N.S.*, 899 F.2d 304 (4th Cir. 1990) (en banc). The BIA has not required any showing of the persecutor's intent in such cases. The BIA also has held that punishment for draft resistance may amount to persecution where disproportionately severe harm would result on account of a characteristic or belief. 19 I&N Dec. at 506.

forcibly recruited into military service despite deeply held convictions, and (2) those who face disproportionately severe punishment for resisting military recruitment. The decision of the Court below should, therefore, be affirmed.

ARGUMENT

I. THE INTERNATIONAL REFUGEE DEFINITION INCLUDES THOSE WHO OBJECT TO MILITARY SERVICE FOR REASONS OF CONSCIENCE AND THOSE WHO MIGHT SUFFER DISPROPORTIONATELY SEVERE PUNISHMENT FOR REFUSING TO SERVE.

Under the 1951 Convention and the 1967 Protocol, a refugee is a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" is outside the country of his nationality and unable or, owing to such fear, unwilling to avail himself of the protection of that country.

Petitioner argues for an unduly narrow, inflexible interpretation of this definition. According to the Petitioner, "unless the persecutor intends to hurt the asylum applicant because of *the applicant's* political opinion, the applicant is not eligible for asylum." Pet. Brief 14 (emphasis in original). To the Petitioner, "the persecutor's state of mind is determinative." *Id.* at 9.

The language of the international refugee definition quoted above does not require Petitioner's strict interpretation. Article I.A(2) of the 1951 Convention does not say that persecution exists solely if it is intended as such from the point of view of the persecutor. "Owing to a well-founded fear of being persecuted for reasons of . . . political opinion" points in two directions. The reasons can have their nexus either with the applicant's fear or with the persecutor's motivation.

Nor does the text specify whether the applicant for refugee status must fear persecution on account of a political opinion that he actually holds, or whether such fear may be based on a reasonable belief that the persecutor will impute an objectionable opinion to the applicant. It simply says that the persecution must be for reasons of one of the five enumerated factors. The application of the term at issue by UNHCR and various signatories to the 1951 Convention and 1967 Protocol confirms this understanding of the textual language.

A. Conscription That Disregards an Individual's Genuine Convictions Can Provide the Basis of an Asylum Claim, Regardless of the Persecutor's State of Mind.

As the UNHCR and signatory interpretations discussed below demonstrate, Petitioner ignores the fact that laws with seemingly legitimate aims can, in practice, severely penalize individuals in the exercise of their fundamental rights to freedom of thought, conscience, and religion. As such, Petitioner's restrictive approach conflicts with international standards interpreting the refugee definition.

It also disregards the purpose of refugee law, which is to provide protection against the violation of fundamental human rights, including the exercise of one's freedom of conscience. *See* Preamble to the 1951 Convention; Articles 14 and 18 of the Universal Declaration of Human Rights, U.N. General Assembly Resolution 217 A (III), 10 December 1948. Refugee law becomes particularly pertinent where there is a dispute between an individual and the State or *de facto* authority which would result in the punishment of the individual for exercising those protected rights.

That Petitioner errs in viewing the refugee definition in so narrow a fashion can be seen from the guidance provided by UNHCR to governments in interpreting the 1951 Convention and

1967 Protocol.[4] Paragraph 170 of the UNHCR *Handbook* states that:

> "the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience."[5]

No demonstration of the persecutor's motivation to harm the conscientious objector is required in such cases. What matters is the impact of the government's act: the effect would be to deny the objector his freedom of religion or conscience.[6] Thus in cases

---

[4] There can be no doubt that the refugee law at issue in this case must be interpreted consistently with the provisions of the 1951 Convention and the 1967 Protocol. *See* footnote 1, *supra*, at 3.

[5] The *Handbook* was prepared by UNHCR at the request of States Members (including the U.S.) of the Executive Committee of the High Commissioner's Program (Executive Committee) for the guidance of governments. *See* Executive Committee Conclusions No. 8 (XXVIII), Report of the 28th Session of the Executive Committee of the High Commissioner's Program, UN Doc. A/AC. 96/549 (1977) at ¶ 53.6(g). The *Handbook* is based on UNHCR's accumulated knowledge, including the practices and procedures of States. *Handbook*, at 1. As this Court has observed, "the *Handbook* provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (citations omitted).

[6] Of course, just because a person evades military service does not make him a refugee. "A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat." *Handbook* ¶ 168. Moreover, not every asylum claimant who objects to military service for reasons of conscience will be a refugee. As UNHCR makes clear, an applicant claiming to be an objector of conscience must demonstrate the

(continued...)

concerning the general application of a law such as conscription where no alternative to military service exists, the persecutor's motivation is both unnecessary and irrelevant in establishing a well-founded fear of persecution based on an individual's beliefs.[7]

Decisions of municipal tribunals of other Convention and Protocol signatories also demonstrate that Petitioner's single-minded focus on the persecutor's state of mind is unwarranted. These authorities have found that, regardless of the persecutor's motivation, disregard of an individual's religious or political beliefs can amount to persecution on account of those beliefs.

---

[6](...continued)
sincerity of his convictions:

> "The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions."

Id. at ¶ 174.

[7] Petitioner's argument fails to take account of *Matter of A-G-*, 19 I&N Dec. at 506, in which the BIA agreed with the principle that the persecutor's motivation is not always a necessary element of a well-founded fear of persecution. Citing the *Handbook*, the BIA held that persecution exists where an asylum applicant would be required to engage in inhuman conduct as a result of military service required by the government. The BIA clearly recognizes in such cases that the persecutor's state of mind is irrelevant. The persecutor does not intentionally conscript an individual to engage in inhuman conduct *because* the persecutor disagrees with that person's political opinion. Nor is the punishment of resisters necessarily motivated by any such disagree- ment. Petitioner's argument, then, certainly proves too much even under the BIA's jurisprudence.

The Canadian Immigration Appeal Board,[8] for example, granted asylum to a Jehovah's Witness from El Salvador who refused to serve in the military because of his "strongly held conscientious objections to taking human life." *Ramirez, Louis Alberto Mena* v. *Minister of Employment and Immigration*, IAB No. 86-6161 at 4 (May 5, 1987). The Canadian Board determined that the requirement of military service could amount to persecution:

> "It matters little that [the applicant] is subjected to the same conscription laws or practices as other young men of military age who are without such scruples; the issue is not equal treatment, but fear of persecution . . . . Were [the applicant] required to enter the military and undertake military duties which would deeply offend his sensibilities, he would, in the Board's opinion, be suffering persecution."

Id. The Canadian Board next addressed the question of "whether the cause of the fear [of persecution] is by reason of race, religion, nationality, membership in a particular social group or political opinion," *id.* at 5, and found that the applicant suffered persecution "by reason of religion":

> "It is the religion of [the applicant] that is at the root of his convictions and scruples. For the fear

---

[8] Until recently, the Immigration Appeal Board (IAB) of Canada, the highest administrative tribunal concerned with immigration matters (comparable to the BIA), determined refugee appeals. In 1989, however, the IAB was restructured under a new name, the Immigration and Refugee Board, and its separate functions are now divided between the Convention Refugee Determination Division (CRDD) and the Immigration Appeal Division. The Immigration Act, R.S.C. 1985 [4th Supp.], c. 28. Canadian administrative cases discussed herein are cited by name where possible, but it has been the recent practice of the CRDD to delete identifying information from publicly released decisions. Such cases are cited by docket number and date.

> of persecution to exist, the state need not deliberately search out such people for systematic and conscious persecution; indeed, here the state apparently allows the witnesses of Jehovah to practice their religion in their Halls without hinderance. However, the Board finds a systemic persecution by reason of religion. It is the failure of the recruiting system to make allowances for the convictions of the conscientious objector that forms the basis of the fear. Such a failure amounts to fear of persecution within the meaning of the Act."[9]

Id. Here the Board did not require evidence of the state's intent to punish the applicant for being a Jehovah's Witness. "Systemic persecution" that forces an individual to commit acts that are abhorrent to his beliefs can be the basis for the grant of asylum.

Tribunals in the United Kingdom have also recognized that an individual can, in some instances, be eligible for asylum due to a form of "systemic persecution," as when South African citizens

---

[9] The Canadian Immigration Act, 1976, reads:

> "'Convention refugee' means any person who
>
> > (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
> >
> > > (i) is outside the country of his nationality and is unable
> >
> > or, by reason of that fear, is unwilling to avail himself of the protection of that country."

R.S.C. 1988, c. 35, S. 1(2).

have faced punishment for refusal to serve in the military because of the individuals' abhorrence to apartheid. Three such U.K. cases are described by the Immigration Appeal Tribunal in *P.P. Matkov* v. *Secretary of State for the Home Department,* No. TH/106300/83 (3331) at 5-6 (July 19, 1984). The tribunal explained that where the law of the land involves "a course of conduct abhorrent to a fundamental concept of our society[,] any sanctions imposed to enforce it may amount to persecution, provided the refusal to carry out the course of conduct was based on a ground specified by the Immigration Rules." *Id.*[10] Reflecting the protection of human rights fundamental to the 1951 Convention and 1967 Protocol, *see supra* at 6, the tribunal in *Matkov* thus recognized that a government can persecute an individual on account of his beliefs merely by enforcing a law of general application.[11] Petitioner's suggested standard, however, would not allow asylum in such circumstances.

---

[10] The U.K. Immigration Rules state:

> "A person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any such claim is to be carefully considered in the light of all the relevant circumstances."

See Matkov at 1.

[11] The U.K. decisions did not go as far as the Canadian Board, *supra,* at 8-10. The tribunal in *Matkov* contrasted the South African cases with *Doonetas* v. *Secretary of State,* No. TH/12339/75 (820) (Oct. 14, 1976), in which the tribunal had held that an individual was not necessarily eligible for asylum because he objected to military service based on his religious beliefs. *Id.* The tribunal specifically stated that the South African cases qualified *Doonetas* in stressing that persecution can result from a law of general application involving abhorrent conduct. *Matkov* at 6.

Like the Canadian Board, the highest Administrative Court in Germany[12] granted asylum to an individual whose religious convictions did not permit him to bear arms. BVerwG IC 41.60 (29 June 1962). The court found that the asylum applicant:

> "was involved in a conflict between two duties: on the one hand, the State required him to perform military service; on the other hand, his religion required him to refrain from such service for reasons of conscience. If the State takes action against the person involved in such a conflict, the effect as far as he is concerned is persecution because of his religion . . . . "

Here again, in focusing on the perspective of the asylum applicant, the court did not require proof of the persecutor's subjective motivation.

Austrian law also recognizes that a person who objects to military service based on deeply held convictions may be a refugee. Interpreting the Austrian Asylum Law of 1968, the Federal Ministry of the Interior issued a regulation which states that an individual is eligible for asylum if that individual (1) refuses to serve in the military for Convention reasons and (2) is permitted no option to perform civilian rather than military service. The rule recognized that severe punishment would follow for such a refusal to serve. Regulation No. 22.501/4/-II/C/75 (June 4, 1975). The elements of this Austrian regulation evidence a concern with the impact of persecution on the victim, rather than with the persecutor's state of mind.

In sum, these cases, the regulation, and the *Handbook* demonstrate that under the 1951 Convention and the 1967

---

[12] Administrative courts hear all the cases involving administrative law matters in Germany. The highest administrative court is the Federal Administrative Court in Berlin.

Protocol, conscription that disregards a person's genuine convictions may be the sole ground for a valid claim to refugee status — regardless of the persecutor's state of mind.

B. An Individual May Be Persecuted "On Account of" Political Beliefs If He Faces Disproportionately Severe Punishment for an Offense.

In certain circumstances, particularly in cases of refusal to perform military service, the authorities of several signatory States have determined that an individual possesses a well-founded fear of persecution for reasons of his political or religious beliefs when a persecutor threatens that individual with a harm out of proportion to any "offense" he may have committed. As stated in the UNHCR *Handbook:* "A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offense on account of his race, religion, nationality, membership of a particular social group or political opinion." *Handbook* ¶ 169; *accord Matter of A-G-*, 19 I&N Dec. at 506. The victim in such instances may object to military service for religious, moral or political reasons about which the persecutor may not know or care. But these cases show that the persecutor typically interprets the individual's refusal to serve as an act of political opposition and for this reason threatens the individual with harsh punishment.

As such, the logic of the decisions discussed, *infra*, at 14-19, would appear to be consistent with Petitioner's position regarding the persecutor's motivation. In these cases, the severity of the punishment is generally taken as conclusive evidence of the persecutor's intention to inflict suffering on account of a person's imputed political opinion.[13] Thus even if the persecutor's

---

[13] The UNHCR *Handbook* recognizes that an applicant need not demonstrate that he is at risk because of an opinion that he actually holds where the persecutor attributes an objectionable opinion to him. *Handbook* ¶ 80.

(continued...)

motivation could be described as a critical element in the determination of whether an individual fears persecution, these cases demonstrate the ease with which tribunals find this element satisfied.

Specifically, in a variety of decisions, Canadian courts and administrative bodies have granted asylum to applicants who were perceived as political enemies simply because they refused to perform military duty. In *Jorge Ardon Abarca* v. *Ministry of Employment and Immigration,* IAB No. W86-4030-W (Mar. 21, 1986), the applicant refused to report for military duty because he objected to human rights abuses perpetuated by the Salvadoran army. *Id.* at 2, 6. The applicant had testified that he had never been politically active, *id.* at 2, and there was no evidence that the government knew precisely why the applicant had refused to serve his military obligation. However, evidence indicating that the applicant feared he "would be detained, tortured and beaten, or killed" for his unwillingness to serve in the military, *id.*, did convince the Canadian Board that the applicant's fear was "one of persecution, not mere prosecution." *Id.* at 6. The Canadian Board found that the applicant's refusal to serve "has been perceived as a serious or threatening act of political opposition to the system as a whole." *Id.*

In another case involving a Salvadoran who feared severe punishment for his desertion from the army, the Canadian CRDD reviewed international jurisprudence and the UNHCR *Handbook* to determine the eligibility of the applicant for asylum. CRDD

---

[13](...continued)
Petitioner quotes the critical language of Paragraph 80, Pet. Brief at 25 n.9., and suggests that the BIA "echoes" the UNHCR interpretation.

Petitioner's principle regarding the persecutor's motivations would logically apply to a Convention characteristic (race, religion, nationality, or social group) as well as an opinion. Thus, for example, persecution would exist where the authorities mistakenly attribute a racial characteristic to a person and consequently threaten his life or liberty, as the Nazis did.

No. T89-05407 at 3-4, 6 (May 31, 1990). The CRDD held that the applicant's refusal to serve would be:

> "considered to be not merely a breach of the law, but an act of disloyalty to the government. Such deserters are labelled 'subversives' and 'guerrilla supporters'. The resulting punishment could be torture or death."

Id. at 6. The CRDD concluded that the applicant was "a Convention refugee by reason of his political opinion" because "the possible excessive punishment of torture and death would not be for the act of desertion but for the perceived political act taken against the government". *Id.*; *accord Padilla* v. *Canada,* [1991] F.C.J. No. 71 (C.A.,[14] Jan. 31, 1991); CRDD No. T89-01690 (Jan. 8, 1990).

As indicated by these cases, the Canadian authorities do not recognize "draft evaders" or "military deserters" *per se* as refugees. Instead, these tribunals have examined whether punishment for disobedience is consistent with standards of fundamental fairness.[15] For example, in CRDD No. V89-00924 (June 8, 1990), the Canadian CRDD granted asylum to an Iraqi citizen who feared execution as a military deserter if he returned to Iraq. *Id.* at 3. The CRDD held that, although fear of punishment "solely for refusal to perform military service" is not considered persecution,

> "[i]t has however been recognized internationally that when the refusal to perform military service

---

[14] There is only one Federal Court of Appeals in Canada.

[15] *Cf. Musial* v. *M.E.I.*, [1982] 1 F.C. 290, 38 N.R. 55 (C.A.) (punishment faced for refusal to serve in Polish military constituted only prosecution, not persecution).

> stems from sincere personal or religious conviction, or an unwillingness to participate in internationally condemned acts of violence, or where the punishment for refusal to perform service is disproportionately severe, this punishment may amount to persecution."

Id. at 5 (citing UNHCR *Handbook* ¶¶ 167-174). Based on evidence that the applicant feared that he would be executed because the government would consider him a political enemy of the regime for his refusal to serve, the CRDD determined that the applicant "has established a well-founded fear of persecution for reason of his political opinion (as perceived by the Iraqi government)." CRDD No. V89-00924 at 4, 6.

Similarly, in Decision No. T89-01610 (July 1989), the CRDD held that although the applicant, an Afghan national, had never demonstrated strong political convictions, "his refusal to join in the fighting on the government's side [in the civil war] *could* be perceived by the government as an opposing political statement" for which the applicant faced "disproportionately severe punishment". *Id.* at 5 (emphasis added). On this basis, the CRDD granted political asylum.[16]

---

[16] Persecution for imputed political opinion has not been limited to cases that involve individuals refusing to perform military service. In *Hilo* v. *Canada*, [1991] F.C.J. No. 228 (C.A., March 15, 1991), the asylum applicant was a Syrian national who was part of a charitable religious group that actively raised funds to send food to needy people in Lebanon. Syrian police, suspicious of the group's intentions, warned the group to stop meeting, then beat and imprisoned one member of the group who had attempted to explain the group's philanthropic motivation. The court found that the Syrian security forces persecuted the group because they thought it was "politically motivated against the government and thus politically undesirable". In this case, there was no nexus between the views of the applicant and the views attributed to him by the authorities. Nonetheless, the court held that the applicant was persecuted on account of political opinion and was a refugee within the meaning of the Convention.

In a case analogous to Respondent's, the Canadian CRDD granted asylum to an applicant threatened by non-governmental agents of persecution. CRDD No. M89-00149 (Feb. 20, 1989). In that case, the applicant, a Lebanese national, went into hiding after he had been ordered to join the Amal militia by armed individuals. The applicant refused to join the militia because he knew that the militia killed innocent people. *Id.* at 2. Recognizing that the applicant's refusal to join the militia was for "valid reasons of conscience," and that the applicant's "life was at stake because he refused to join,"[17] the Canadian CRDD held that the applicant was eligible for asylum. *Id.* at 3. The CRDD did not examine the subjective motivation of the persecutor to determine whether the "persecutor's disagreement with the victim's . . . beliefs [was] the cause in fact of the persecution." *See* Pet. Brief 19.

Tribunals in the U.K. have also recognized that punishment for noncompliance with a law compelling military service can "amount to persecution . . . if a State . . . exceed[s] that which is thought to be acceptable limits in enforcement because of its national interests." *Matkov* at 7.[18] Regardless of whether the state knows of and disagrees with a victim's opinion or conviction that causes that individual to breach a legal duty, punishment for that breach can constitute persecution.[19]

---

[17] In many instances, non-governmental agents of persecution are less likely to have an established judicial system capable of applying the rule of law to individuals who refuse to be forcibly recruited.

[18] *See also R* v. *Secretary of the State for the Home Department ex parte Zia Mehmet Binbasi*, [1989] Imm AR 595, 599 (July 25, 1989) (although asylum cannot be granted simply because applicant is unable to "enjoy the 'full range of freedoms he would enjoy" in the U.K., "a judgment has to be made as to whether the interference with freedom is sufficiently serious to merit asylum").

[19] The British courts have, in other circumstances, found that punishment for breach of a law of general application does not constitute persecution, but

(continued...)

German tribunals have granted asylum in circumstances such as those described in the Canadian cases cited *supra*, at 14-17. In its decision of June 23, 1988, the Bavarian Administrative Court, Ansbach recognized that a valid asylum claim can be based on fear of extrajudicial punishment for reasons of perceived political opposition. Bayer.VG (AN 19 K 87.35820). In that case, the Ethiopian applicant was from the province of Tigre and had refused to serve in the military. Evidence indicated that the government would likely detain, torture, or execute the applicant solely for suspicion of political opposition, a suspicion based on the applicant's refusal to serve in the military.[20]

In sum, the cases discussed in this brief show that a persecutor's desire to overcome an individual's actual belief is not always necessary to establish a well-founded fear. The objector of conscience must demonstrate that his convictions "are not taken into account by the authorities in requiring him to perform military service," *Handbook* ¶ 172, and that "but for" his sincere convictions he would not be at risk of serious harm. Others who resist military service must show that disproportionately severe punishment may result from a refusal to serve. Such an

---

[19](...continued)
those cases did not involve either (1) legal obligations to engage in abhorrent conduct or (2) disproportionate punishment for the breach. *See Atibo* v. *Immigration Officer*, [1978] Imm AR 93 (Feb. 28, 1978) (applicant not persecuted simply because he would be punished in Mozambique if he proselytized in public, in violation of law prohibiting all public meetings). The distinction featured in *Atibo* is reflected as well in international human rights law, which includes refugee law. The exercise of freedom of expression, (generally given unqualified protection under the First Amendment of the United States Constitution), is subject to certain restrictions regarding the protection of national security and public order. *See* Art. 19(3)(b), International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967).

[20] *See also* Decisions No. 438-01986-88 and No. 438-01318-86 of the Federal Office for the Recognition of Foreign Refugees (Aug. 3, 1988) (applicants granted asylum where they faced significant punishment for refusal to serve in the Iraqi army).

interpretation of persecution "for reasons of" a political opinion accords with the guidance provided by the international agency charged with supervising the application of the 1951 Convention and 1967 Protocol. *See* U.N. General Assembly Res. 428(V) 1950, Annex: Statute of the Office of the United Nations High Commissioner for Refugees, ¶ 8(a).

Rather than interpret the definition consistently with its actual application, however, Petitioner chose to construct its unduly inflexible standard from the limited definitions of various dictionaries. As a basis for doing so, Petitioner explained that this approach is required "[i]n the absence of . . . common law meaning." Pet. Brief 12. This asserted premise ignores the fact that for some forty years signatories have interpreted substantially the same language in connection with the myriad manifestations of persecution that have occurred in the world.[21] As demonstrated below, United States courts give significant weight to the practice of other States when interpreting the same treaty.

II. STATE PRACTICE SHOULD BE GIVEN CONSIDERABLE WEIGHT IN THE INTERPRETATION OF THE CONVENTION AND THE PROTOCOL.

State practice is clearly a relevant aid in the interpretation of the 1951 Convention and 1967 Protocol. According to the Vienna Convention on the Law of Treaties,[22] when interpreting

---

[21] Because victims of persecution at times face circumstances that defy application of an inflexible standard of asylum eligibility, it is essential that the refugee definition be applied on a case-by-case basis. *See Cardoza-Fonseca*, 480 U.S. at 448.

[22] May 23, 1969, 1155 U.N.T.S. 331. The United States has signed the Vienna Convention but has not ratified it. The United States generally recognizes the Vienna Convention as codifying customary international law
(continued...)

a treaty, "[t]here shall be taken into account . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Art. 31, 155 U.N.T.S. at 340.

It has been well established by this Court that "'treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Eastern Airlines, Inc.* v. *Floyd*, 111 S. Ct. 1489, 1493 (1991) (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-32 (1943) (emphasis added)). Accordingly, this Court has stated that "[w]e must . . . consult the opinions of our sister signatories in searching for the meaning" of the treaty term in question, *Eastern Airlines*, 111 S. Ct. at 1501, and that "'the opinions of our sister signatories [are] entitled to considerable weight.'" *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins* v. *British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)).

This Court has previously justified its interpretation of a treaty term as "consistent with . . . the conduct of the parties to the Convention, and the weight of precedent in foreign . . .

---

[22](...continued)
binding on U.S. courts. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States, Introductory Note to Part III ("The Department of State has on various occasions stated that it regards particular articles of the Convention as codifying existing international law; United States courts have also treated particular provisions of the Vienna Convention as authoritative." (citing Department of State practice and court cases, including judicial application of Article 31 on interpretation)); *see also* Congressional Research Service, 98th Cong., 2d Sess., S. Pr. No. 98-205, *Treaties and Other International Agreements: The Role of the United States Senate* 41 (1984) (even though the United States is not a party, the Vienna Convention "retains its status as a primary source of international law concerning treaties, *even for nonparties*" (emphasis added)).

courts." *Saks*, 470 U.S. at 400.[23] Just this past term, the Court concluded that "the evidence of the post-[signature] 'conduct' and 'interpretations of the signatories' . . . support[ed] [its] narrow translation" of a key treaty term. *Eastern Airlines*, 111 S.Ct. at 1499 (quoting *Saks*, 470 U.S. at 403).

Therefore, when interpreting the phrase "for reasons of . . . political opinion" in the 1951 Convention, the Court should consider how other parties' courts and administrative agencies have interpreted this phrase and should give these interpretations "considerable weight."[24] In this instance, the application of this principle requires the rejection of Petitioner's unjustifiably narrow interpretation of the ambit of refugee protection.

---

[23] In interpreting Article 17 of the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, the Court found that "[r]eference to the conduct of the parties to the Convention and the subsequent interpretations of the signatories help[ed] clarify the meaning" of the word "accident." *Saks*, 470 U.S. at 403.

[24] This Court's own interpretations of the international refugee definition have been considered by other parties' courts. *See Chan* v. *Minister for Immigration and Ethnic Affairs*, 87 A.L.R. 412 (1989); *Regina* v. *Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 2 W.L.R. 92, 1 All E.R. 193.

CONCLUSION

For the foregoing reasons, the Lawyers Committee for Human Rights and the American Jewish Committee respectfully urge the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

O. THOMAS JOHNSON, JR.
ANDREW I. SCHOENHOLTZ
T. MARK LANGE
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044

ARTHUR C. HELTON*
THE LAWYERS
COMMITTEE FOR
HUMAN RIGHTS
330 Seventh Avenue
10th Floor
New York, New York 10001
(212) 629-6170

Of Counsel:

SAMUEL RABINOVE
THE AMERICAN JEWISH
COMMITTEE

Attorneys for *Amici Curiae*

*Counsel of Record

August 14, 1991

(8)

No. 90-1342

Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF RESPONDENT

JULIAN FLEET
FERNANDO CHANG-MUY
Office of the United Nations High Commissioner for Refugees
1718 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 387-8546

Of Counsel:
GUY S. GOODWIN-GILL

ARTHUR L. BENTLEY, III *
ELISA C. MASSIMINO
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5739

* Counsel of Record

Attorneys for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. FORCED RECRUITMENT BY A GUERRILLA GROUP PROVIDES A BASIS FOR A CLAIM OF PERSECUTION ON ACCOUNT OF POLITICAL OPINION WITHIN THE MEANING OF THE UNITED NATIONS CONVENTION AND THE REFUGEE ACT 6

A. The Definition of "Refugee" In The Refugee Act Must Be Construed Consistently With The United Nations Convention And Protocol 6

B. Petitioner's Interpretation Of The Refugee Definition Is Inconsistent With The United Nations Convention and Protocol 7

C. An Asylum-Seeker Need Not Prove The Subjective Motives Of The Persecutor In Order To Establish Refugee Status 10

1. The Focus Of A Refugee Status Determination Is On The Asylum-Seeker's State Of Mind 11

2. Forced Recruitment Or Retaliation For Refusal To Join A Guerrilla Group Is Sufficient Harm To Support A Claim Of Persecution 12

3. Persecution Is "On Account Of" Political Opinion When A Political Opinion Leads To Persecution, Regardless Of The Motive Of The Persecutor 15

4. Resistance To Recruitment By A Guerrilla Group Is The Manifestation Of A Political Opinion 17

TABLE OF CONTENTS—Continued

II. UPHOLDING THE NINTH CIRCUIT'S DECISION IN THIS CASE WILL NOT MAKE ALL "DISPLACED PERSONS" AND DRAFT EVADERS ELIGIBLE FOR ASYLUM 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases: Page

Ananeh-Firempong v. *INS*, 766 F.2d 621 (1st Cir. 1985) 12
Bolanos-Hernandez v. *INS*, 767 F.2d 1277 (9th Cir. 1984) 13
Carvajal-Munoz v. *INS*, 743 F.2d 562 (7th Cir. 1984) 12
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 6, 7, 11, 12
McMullen v. *INS*, 658 F.2d 1312 (9th Cir. 1981) 12, 13
Mountain States Tel. & Tel. Co. v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985) 11
Murray v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 7
Washington v. *Davis*, 426 U.S. 229 (1976) 16
Weinberger v. *Rossi*, 456 U.S. 25 (1982) 7

Treaties, Statutes and Regulations:

1951 United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ..... 2, 6, 9, 13
1967 United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 2
Constitution of the International Refugee Organization, Dec. 16, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3 8
The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, *codified at* 8 U.S.C. § 1101(a)(42)(A) (1991) 6

United Nations Materials:

34 U.N. GAOR Supp. (No. 12A), U.N. Doc. A/AC.96/572 (1979) 11
35 U.N. GAOR Supp. (No. 12A), U.N. Doc. A/AC.96/588 (1980) 11
Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 2-25, 1951, 189 U.N.T.S. 138 10

TABLE OF AUTHORITIES—Continued

	Page
Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum No. 138/89, Field-Office Memorandum No. 114/89 (Dec. 18, 1989)	13, 19
Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum/Field-Office Memorandum (unnumbered) (March 1, 1990)	15
Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), 5 U.N. GAOR Supp. (No. 20) 46 Annex, U.N. Doc. A/428 (1950)	1, 2
U.N. Doc. E/AC.32/SR.3 (1950)	8, 9
U.N. Doc. E/AC.32/SR.18 (1950)	17
U.N. Doc. E/1618 Annex (1950)	17
U.N. Doc. A/Conf.2/SR.3 (1951)	9
United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1988)	*passim*
Universal Declaration of Human Rights, G.A. Res. 217A(III), 3 U.N. GAOR Resolutions, 1st pt. at 71, U.N. Doc. A/810 (1948)	13

Miscellaneous:

A. Grahl-Madsen, *The Status of Refugees in International Law* (1966)	8, 10
G. Goodwin-Gill, *The Refugee in International Law* (1983)	13, 18, 19
Gunning, *Expanding the International Definition of Refugee: A Multi-Cultural View*, 13 Fordham Int'l L.J. 35 (1989)	6
H.R. Rep. No. 608, 96th Cong., 1st Sess. (1979)	7
H.R. Rep. No. 781, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 160	7
J. Hathaway, *The Law of Refugee Status* (1991)	2, 6, 17, 19
S. Rep. No. 256, 96th Cong., 1st Sess. (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 141	7

TABLE OF AUTHORITIES—Continued

	Page
Singer, *Sutherland Stat. Const.* (4th ed. 1984)	11
The American Heritage Dictionary (2d College ed. 1982)	18
U.S. Department of State, *Country Reports on Human Rights Practices for 1990*, 102d Cong., 1st Sess. (Joint Comm. Print 1991)	15
Weis, *Convention Refugees and De Facto Refugees*, in *African Refugees and the Law* (G. Melander and P. Nobel ed. 1978)	9
Weis, *The Concept of the Refugee in International Law*, 4 Journal du Droit International 928 (1960)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1342

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

The Office of the United Nations High Commissioner for Refugees [hereinafter "UNHCR"] is charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of seeking permanent solutions to the problems of refugees.[1] The Stat-

[1] Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), 5 U.N. GAOR Supp. (No. 20) 46 Annex at 46, ¶ 1, U.N. Doc. A/428 (1950).

ute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." [2]

The supervisory responsibility of UNHCR is also formally recognized in the 1967 United Nations Protocol relating to the Status of Refugees [hereinafter "1967 Protocol"], to which the United States became a party in 1968:

> The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees * * * in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.[3]

The views of UNHCR are informed by forty years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides direct assistance to refugees throughout the world and has representatives in over 80 countries: in its Geneva headquarters, in major capitals, on borders, and in numerous remote corners of the world where refugee crises may occur. UNHCR was acknowledged for its work on behalf of refugees by the award of the Nobel Peace Prize in 1954 and again in 1981. Based on the experience accumulated since its establishment in 1951, UNHCR is uniquely qualified to present its views.

---

[2] *Id.* at 47, ¶ 8(a).

[3] Jan. 31, 1967, art. II, ¶ 1, 19 U.S.T. 6223, 6226, T.I.A.S. No. 6577, at 4, 606 U.N.T.S. 267, 270. The 1967 Protocol and the 1951 Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter "1951 Convention"], are multilateral treaties that provide the primary international definition of "refugee" and set forth the rights and obligations of persons who satisfy that definition. These international instruments have been signed by more than 100 countries and are the only refugee accords of global scope. J. Hathaway, *The Law of Refugee Status* v (1991).

The present case concerns the interpretation of statutory provisions based on the 1951 Convention and the 1967 Protocol. Thus, it presents questions involving the essential interests of refugees within the mandate of the High Commissioner. Resolution of the case is likely to affect the interpretation by the United States of the 1967 Protocol with regard to the determination of refugee status and the grant of asylum to those who qualify for such status. Moreover, UNHCR anticipates that the decision in this case may influence the manner in which the authorities of other countries apply the refugee definition contained in the 1951 Convention and incorporated by reference in the 1967 Protocol.

UNHCR has the consent of all parties to this case to present its views.

SUMMARY OF ARGUMENT

This case is about whether forced recruitment or punishment for refusal to join a guerrilla group may constitute persecution on account of political opinion—and thus serve as the basis for a claim of refugee status—in the absence of proof regarding the specific motive of the guerrillas. At the center of this issue is statutory language of the 1980 Refugee Act that comes directly from an international treaty to which the United States is a signatory. It is not disputed by the parties to this case that when Congress passed the Refugee Act, it intended that the definition of "refugee" contained therein be interpreted consistently with the international definition from which it was derived.

Petitioner's position is that, in order to show persecution on account of political opinion, an asylum-seeker must prove that his persecutors specifically intended to "discriminate against [him] because of his political beliefs." Petitioner's Brief at 10 [hereinafter "Pet. Br."]. Moreover, Petitioner's scheme would require an asylum-seeker to overcome a presumption that the motive of a

guerrilla group engaging in forced recruitment is only "to field an army." Pet. Br. at 27. To support this view, Petitioner refers the Court to a definition of "refugee" that was *not* adopted by Congress and that was operative in the international community for only a short period after World War II. Petitioner also contends that the requirement it asks this Court to engraft upon the refugee definition—proof of the persecutor's motive—is necessary to avoid a blanket grant of refugee status to *all* persons fleeing generalized civil strife, as well as to *all* persons evading conscription.

This brief will show, first, that the statutory language at issue must be construed consistently with the 1951 Convention and 1967 Protocol. The definition of "refugee" adopted by Congress was derived from an international treaty definition that far surpassed in scope previous definitions. The 1951 Convention was expressly intended to broaden the definition of "refugee" that had been provided under predecessor instruments.

Second, this brief will show that requiring proof of the persecutor's discriminatory motive is inconsistent with accepted international interpretations of the term "refugee," including the interpretation of UNHCR. Examination of the analytic framework for refugee status determinations reveals that a person may satisfy the definition without any reference to persecutorial intent.

The focus of a refugee status determination is on the asylum-seeker's state of mind, not the intent of the persecutor. Forced recruitment or retaliation for refusal to join a guerrilla group deprives its victims of life or physical freedom and clearly constitutes sufficient harm to support a claim of persecution. This brief will demonstrate that the statutory "on account of" language requires only that there be some nexus between a political opinion and the feared persecution. Nowhere does the definition of "refugee" or the established analytic framework

for determining refugee status contemplate that a showing of persecutorial intent is necessary to establish this nexus. Moreover, the conscious refusal to join a guerrilla group is a political act that places an individual in opposition to his recruiters and manifests an essentially political opinion.

Finally, this brief will show that upholding the decision of the court below will not result in blanket refugee eligibility for all displaced persons and draft evaders. The definition of "refugee" contained in the 1951 Convention, 1967 Protocol and the Refugee Act is limited to persons who can show a well-founded fear of individualized persecution. Many persons displaced by generalized conditions of violence in war-torn countries have not been subject to forced recruitment and may have no reason to fear persecution. Furthermore, conscription by a legitimate government is distinguishable from forced recruitment by a para-military or subversive group. Although persons fleeing the compulsory conscription laws of a legitimate government may, in limited circumstances, establish a claim for refugee status, the mere fear of prosecution for draft evasion does not by itself constitute a well-founded fear of persecution under the definition of "refugee."

ARGUMENT

I. FORCED RECRUITMENT BY A GUERRILLA GROUP PROVIDES A BASIS FOR A CLAIM OF PERSECUTION ON ACCOUNT OF POLITICAL OPINION WITHIN THE MEANING OF THE UNITED NATIONS CONVENTION AND THE REFUGEE ACT.

A. The Definition of "Refugee" In The Refugee Act Must Be Construed Consistently With The United Nations Convention And Protocol.

The 1951 Convention provides that the term "refugee" shall apply to any person who, "owing to a well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or *political opinion*," is unable or unwilling to return to his or her country of origin or former habitual residence. 1951 Convention, *supra* note 3, art. I(A)(2) at 152 (emphasis added). This definition was adopted in the 1967 Protocol,[4] and served as the basis for the definition of "refugee in the 1980 Refugee Act. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987). Under the terms of the Refugee Act, a person who is outside his or her native country and who is unable or unwilling to return to that country because of "persecution or a well-founded fear of persecution *on account of* * * * *political opinion*" is a refugee. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, *codified at* 8 U.S.C. § 1101(a)(42)(A) (1991) (emphasis added) [hereinafter "Refugee Act"].[5]

[4] The 1967 Protocol incorporated by reference the substance of the 1951 Convention definition, but achieved the formal universalization of the definition by prospectively eliminating its temporal and geographic restrictions. J. Hathaway, *supra* note 3, at 10. These changes were affected in order to respond to the changing nature of refugee flows after World War II. Gunning, *Expanding the International Definition of Refugee: A Multi-Cultural View*, 13 Fordham Int'l L.J. 35, 45 (1989).

[5] Petitioner and UNHCR agree that the "on account of" language used in the 1980 Refugee Act has the same denotation as the "for reasons of" language used in the 1951 Convention and adopted in the 1967 Protocol. Pet. Br. at 13.

It is axiomatic that, in passing the 1980 Refugee Act, Congress intended to make the domestic law of the United States consistent with its international obligations under the 1967 Protocol.[6] Indeed, this Court has noted:

> If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees * * * to which the United States acceded in 1968.

Cardoza-Fonseca, 480 U.S. at 436-37.[7]

B. Petitioner's Interpretation Of The Definition Of "Refugee" Is Inconsistent With The United Nations Convention and Protocol.

Although the language chosen by Congress in 1980 to define "refugee" is virtually identical to the corresponding language of the 1967 Protocol,[8] Petitioner's interpre-

[6] H.R. Rep. No. 781, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 160, 160. *See also* S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 141, 144; H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

[7] Although clear congressional intent is evident in this case, construction of the Refugee Act consistent with the 1951 Convention and 1967 Protocol would be required even in the absence of express congressional intent, since the statute must be construed consistently with international law. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (a statute "ought never to be construed to violate the law of nations, if any other possible construction remains").

[8] *Cardoza-Fonseca*, 480 U.S. at 437. Petitioner does not appear to dispute, *see* Pet. Br. at 10, that the language of the Refugee Act at issue in this case must be interpreted consistently with the provisions of the 1951 Convention and 1967 Protocol.

tation of the relevant provisions is far more narrow than that intended by the drafters of the 1951 Convention and 1967 Protocol. By focusing on outdated portions of the definition of "refugee" contained in the Constitution of the International Refugee Organization [hereinafter "IRO"] [9]—"victims of the nazi or fascist regimes," "Spanish Republicans," and "other victims of the Falangist regime in Spain"—Petitioner would have this Court conclude that the history of the international agreements on which the Refugee Act's definition is based operates as a "limitation on asylum eligibility." Pet. Br. at 14-16.[10]

In reality, however, State and United Nations practice, judicial decisions and refugee literature point to a broadening of the concept of "refugee" in international instruments. The definition of "refugee" in the 1951 Convention, although derived in part from the IRO Constitution, was in many ways far more comprehensive and forward-looking than its predecessors.[11] The 1951

---

[9] Dec. 16, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3. The IRO was a temporary, specialized agency of the United Nations that operated from August 1948 to January 1952. 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 18 (1966).

[10] The limited categories of the IRO definition are not relevant to this case. The crucial issue with regard to the history of the definition is how the term "refugee" developed in response to the changing character of refugee problems. It was this developing definition, as incorporated in the 1967 Protocol, with which the drafters of the Refugee Act were familiar and that they intended to adopt.

[11] In discussions formulating the 1951 Convention, one delegate urged that "what had so far been accomplished * * * be reconsidered in a more generous spirit," that the terms be "truly liberal," and that the "definition [of refugee] to be adopted * * * be as all-embracing as possible." U.N. Doc. E/AC.32/SR.3 ¶¶ 25, 26, 28 (1950) (statement of Mr. Rain—France). Another delegate expressed his satisfaction that, under the Convention definition, "protection [w]ould be extended to as many refugees of all categories

Convention provided for the first time in international law a universal definition of "refugee" not limited to individual categories of persons.[12] Accordingly, the Preamble to the 1951 Convention states that "the United Nations has [concluded] that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and *to extend the scope of and the protection accorded by such instruments* by means of a new agreement." 1951 Convention, *supra* note 3, Preamble at 150 (emphasis added).[13]

The drafters did not intend the terms of the 1951 Convention to be interpreted restrictively.[14] They expressly recommended that:

---

as possible." U.N. Doc. A/Conf.2/SR.3 at 5 (1951) (statement of Mr. del Drago—Italy). A statement by one of the drafters of the 1951 Convention confirms that the definition was meant to be interpreted expansively: "[T]he drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered as a * * * refugee." Weis, *Convention Refugees and De Facto Refugees*, in *African Refugees and the Law* 15 (G. Melander and P. Nobel ed. 1978). The United States delegate to the *Ad Hoc* Committee expressed concern that the definition of "refugee" to be adopted not be too narrow and that the field of application of the Convention not be "excessively restricted." U.N. Doc. E/AC.32/SR.3 ¶ 40 (1950) (statement of Mr. Henkin—United States).

[12] "The phrase 'well-founded fear of being persecuted' * * * replaces the earlier method of defining refugees by categories * * *." UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* at ¶ 37 (1988).

[13] Thus, Article I(A)(1) of the 1951 Convention specifies that decisions of non-eligibility by the IRO would not preclude the granting of refugee status to any person who fit the Convention's "refugee" definition. 1951 Convention, *supra* note 3, at 152.

[14] No forms of persecution were intentionally excluded from the Convention's "refugee" definition. According to one of the Convention's key architects and a former Director of the Legal Division of UNHCR, the spectrum of phenomena envisioned by the

> the Convention * * * have value as an example exceeding its contractual scope and that all nations * * * be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.[15]

Thus, contrary to Petitioner's exposition of the history of the refugee definition, the definition of "refugee" acceded to by the United States in 1968 and adopted into domestic law in 1980 was specifically intended to fulfill the broad humanitarian objectives of the international community.

C. An Asylum-Seeker Need Not Prove The Subjective Motives Of The Persecutor In Order To Establish Refugee Status.

The definition of "refugee" requires focus on the state of mind of the person seeking refugee status, not on that of the persecutor. Under the terms of the 1951 Convention and 1967 Protocol, a person seeking refugee status must demonstrate: (1) that he or she has a well-founded fear; (2) that he or she fears persecution; (3) that the feared persecution is for reasons of, (4) one of the five enumerated factors (*e.g.*, political opinion).[16]

---

drafters encompassed a wide variety of measures "in disregard of human dignity." Weis, *The Concept of the Refugee in International Law*, 4 Journal du Droit International 928, 970 (1960). The drafters sought "a flexible concept which might be applied to circumstances as they might arise; * * * they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men." 1 A. Grahl-Madsen, *supra* note 9, at 193.

[15] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 2-25, 1951, IV(E), 189 U.N.T.S. 138, 148.

[16] The interpretation of the "on account of" language must be informed by the meaning of the other elements of the definition: "well-founded fear," "persecution" and "political opinion."

Although Petitioner appears to accept that Respondent has established a well-founded fear of persecution, Pet. Br. at 12, Petitioner later combines the elements of "persecution" and "on account of

1. *The Focus Of A Refugee Status Determination Is On The Asylum-Seeker's State Of Mind.*

The point of departure in a refugee status determination is the asylum-seeker's fear, not the persecutor's intention. The "well-founded fear" portion of the definition contains two separate elements: the applicant's subjective fear and the objective reasonableness of that fear.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* [hereinafter "*Handbook*"] [17]

---

political opinion," defining "persecution" as the "infliction of suffering *because of* the victim's race, beliefs, or nationality," *id.* at 13 (emphasis added). Petitioner in effect collapses the "on account of" language into its definition of "persecution." This interpretation of "persecution" violates a fundamental canon of statutory construction that "[a] statute should be construed so that effect is given to all its provisions so that no part will be inoperative or superfluous." Singer, 2A *Sutherland Stat. Const.* § 46.06 (4th ed. 1984). *See also Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Under Petitioner's interpretation, the "on account of" language is subsumed under the definition of "persecution," making that portion of the statutory language redundant.

[17] The UNHCR *Handbook* was prepared in 1979 at the request of States members of the Executive Committee of the High Commissioner's Programme—the United States among them—in order to provide guidance to governments in applying the terms of the Convention and Protocol. The *Handbook* is based on UNHCR's experience, including the practice of States in determining refugee status, exchanges of views between the Office of the High Commissioner and the competent authorities of Contracting States, and the literature devoted to the subject over a quarter of a century. *Handbook* at 1-2. The *Handbook* has been widely cited with approval both by governments, *see, e.g.*, 34 U.N. GAOR Supp. (No. 12A) at ¶¶ 68, 72(1)(h), U.N. Doc. A/AC.96/572 (1979); 35 U.N. GAOR Supp. (No. 12A) at ¶ 36, U.N. Doc. A/AC.96/588 (1980), and in many judicial decisions. This Court and other United States federal courts have turned to the *Handbook* for guidance in the interpretation of the 1967 Protocol. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("the *Handbook* provides significant guidance in construing the Protocol . . . [and] in giving content to the obligations that the

emphasizes that "[t]he phrase "well-founded fear of being persecuted' is the key phrase of the [refugee] definition. It reflects the views of its authors as to the main elements of refugee character." *Handbook* at ¶ 37. This Court has noted that the "obvious focus" of a refugee status determination is on the "subjective beliefs" of the applicant. *Cardoza-Fonseca*, 480 U.S. at 413. Proof of the state of mind of the persecutor is not required by the Convention, and nowhere appears as a requirement in the *Handbook* sections regarding the interpretation of the term "refugee." *See Handbook* at ¶¶ 35-110. Emphasis on the motive of the persecutor is thus incompatible with the accepted analytic framework for determining refugee status.

2. *Forced Recruitment Or Retaliation For Refusal To Join A Guerrilla Group Is Sufficient Harm To Support A Claim Of Persecution.*

The term "forcible recruitment" refers to the threat or application of force upon an individual to coerce performance of military service, or the retaliation against an individual to punish refusal to serve. Petitioner's extensive reliance on the guerrilla group's ultimate aim "to field an army" and the group's purported non-discriminatory recruitment practices, Pet. Br. at 10, 27-30, misses the point of "*forcible* recruitment." It is not necessarily the initial selection of recruits or mere request to serve in the guerrilla army that constitutes the feared persecution, but rather the concomitant or subsequent use of force to overcome or punish the individual's conscious refusal to go along willingly.

Although the precise parameters of the term "persecution" continue to evolve, there is broad agreement in the

---

Protocol establishes"); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-628 (1st Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981).

international community about the essential elements of "persecution" under the Convention definition. The Universal Declaration of Human Rights, G.A. Res. 217A (III), 3 U.N. GAOR Resolutions, 1st pt. at 71, U.N. Doc. A/810 (1948), [hereinafter "Universal Declaration"], expressly referenced in the Preamble to the 1951 Convention, *supra* note 3, at 150, is a benchmark for the humane treatment of all persons and provides standards for identifying what should be considered persecutory acts. The Universal Declaration identifies as fundamental human rights the right to life, liberty and security of person, as well as the right to freedom of movement. Universal Declaration, *supra* at 72, 74, arts. 3, 13. Thus, at a minimum, "[t]he core meaning of persecution readily includes the threat of deprivation of life or physical freedom." G. Goodwin-Gill, *The Refugee in International Law* 38 (1983) (citations omitted).

Forced recruitment by a guerrilla group [18] is a paradigm of the deprivation of these rights. When a person is recruited, refuses to join and is threatened with abduction or punishment by armed guerrillas, his life and freedom are placed in jeopardy. As the *Handbook* points out: "From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of * * * [one of the five reasons] * * * is *always* persecution." *Handbook* at ¶ 51 (emphasis added).

---

[18] There is no dispute that the Refugee Act encompasses persecution by non-governmental groups. *See, e.g., Handbook* at ¶¶ 65, 98; G. Goodwin-Gill, *supra*, at 42; Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum No. 138/89, Field-Office Memorandum No. 114/89 (Dec. 18, 1989) (the fact that persecution is by a guerrilla group "does not deprive the acts of their persecutory character"); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1284 (9th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981). Petitioner agrees. Pet. Br. at 30 ("many acts by guerrilla groups * * * constitute 'persecution on account of * * * political opinion'").

Indeed, since guerrilla groups lack the legal authority to conscript, the use of force by such groups to defeat or punish the refusal to join would essentially constitute kidnapping, murder, or other illegal conduct. The *Handbook* expressly distinguishes legal *prosecution* from *persecution*:

> In countries where military service is compulsory, failure to perform this duty is frequently punishable by law * * *. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of *prosecution* and punishment for * * * draft-evasion does not in itself constitute well-founded fear of *persecution* under the definition.

Handbook at ¶ 167 (emphasis added).

In contrast to a legitimate government's enforcement of its mandatory conscription laws, the force meted out by a guerrilla group in dragooning civilians into its army or punishing resistance is not prosecution under color of law. The victim of forced recruitment by a guerrilla group has no access to due process of law and is not protected by the safeguards of his or her government's legal code. Moreover, whereas a person resisting legal conscription by his or her government may have the option of alternative service, or in lieu thereof may serve a prison sentence or otherwise comply with a legal judgment, the victim of forced recruitment is at the arbitrary mercy of the particular guerrillas who attempt to recruit him.[19]

---

[19] Enforcement of mandatory conscription laws by a legitimate government may also sometimes constitute persecution. *Handbook* at ¶¶ 167-174. One such instance is when the type of military action engaged in by the state is "condemned by the international community as contrary to basic rules of human conduct." *Handbook* at ¶ 171. Thus, failure to accord protection to a person resisting collaboration with a group that might require him to violate the rights of others would be inconsistent with the humanitarian concepts which gave rise to the 1951 Convention. Indeed, it would seem paradoxical for nations to decry violence perpetrated by rebel groups against sovereign governments on the one hand, *see, e.g.*, U.S. Department of State, *Country Reports on Human Rights Practices for 1990*, 102d Cong., 1st Sess. 632 (Joint Comm. Print 1991) (Country Report on Guatemala) ("Guerrillas engaged in * * * extrajudicial killings, indiscriminate use of land mines, kidnaping, forced labor and recruitment, and the use of children in combat. * * * [G]uerrillas also attacked and destroyed a medical compound operated by an American family * * * and threatened members of that family with death"), and yet deny protection to those individuals who make a conscious choice to refuse to aid in the commission of such acts.

3. *Persecution Is "On Account Of" Political Opinion When A Political Opinion Leads To Persecution, Regardless Of The Motive Of The Persecutor.*

Petitioner argues that a person is not a refugee unless he can prove that the motive of the persecutor was retribution for his political opinion. Pet. Br. at 9-10. This position is inconsistent with the definition of "refugee." In a memorandum intended to instruct United Nations field officers as to the proper application of the definition of "refugee", the Office of the High Commissioner explained:

> The definition [of refugee] does not require that there must be a specific showing that the authorities intend to persecute an individual on account of [one of the five factors]. As long as persecution or fear of it may be related to the grounds given in the definition, it is irrelevant whether the [persecutor] intended to persecute. It is the result which matters.

Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum/Field-Office Memorandum (unnumbered) (March 1, 1990) (emphasis added).

Indeed, this is the only logical interpretation. Proof of motive or intent may be a sufficient, but is not a necessary, condition of a refugee claim. Although the motivation of a persecutor may be relevant, ultimately it is the fact of persecution, not any specific intent to persecute,

that one reasonably fears and from which the Refugee Act seeks to provide protection.

Moreover, the focus on a persecutor's intent injects into a refugee status determination the burden of proof required in the unrelated field of criminal law. Petitioner's interpretation of the "on account of" language would require an asylum-seeker to prove something akin to *mens rea* on the part of the persecutor. But refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is not dependent on such proof. The legal regime of refugee protection—of which the Refugee Act is a part—is centered on the grant of a humanitarian benefit, not on the punishment of persecutors. Thus, an asylum-seeker's burden is to show himself worthy of the benefit; he need not establish his persecutor's state of mind.

Again, this only makes sense. Organizational intent, such as the "intent" of a guerrilla group, is not readily susceptible of proof. In addition, specific discriminatory intent may be impossible to ascertain. *Cf. Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("it is unrealistic * * * to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker"). The new requirement—proof of persecutorial intent—that Petitioner would have this Court engraft upon the established definition of "refugee would require an asylum-seeker to divine the specific motives of groups of people who are not in the habit of formally announcing their intentions *vis-à-vis* individuals. Such a requirement would create a virtually impossible burden of proof and would result in the wholesale denial of otherwise valid claims for refugee status.

Requiring proof of persecutorial intent is inconsistent with the broad purposes of the 1951 Convention and the intent of its drafters. In contrast to the numerous

references to the *asylum seeker's* motive and state of mind, there is no suggestion at any point in the drafting history of the 1951 Convention that the motive or intent of the *persecutor* was ever to be considered a controlling factor in the determination of refugee status.[20]

The "on account of" and "for reasons of" language requires only that there be some nexus [21] between an opinion that can be characterized as political and the risk of harm in the country of origin. J. Hathaway, *supra* note 3, at 137.[22] It is enough that the persecution is a consequence of political opinion. Proof of the persecutor's motive is not required to establish this link.

4. *Resistance To Recruitment By A Guerrilla Group Is The Manifestation Of A Political Opinion.*

There can be few political disagreements more deeply held, and more divisive, than the question of whether an individual is willing to fight, kill and die for a political objective. Petitioner posits the case in which "[a] person might be entirely sympathetic to the goals of the guerrillas, and share *every one of their political beliefs*, but not want to serve in their army," Pet. Br. at 11 (emphasis added), as a situation in which resistance to recruitment by a guerrilla group would not have political meaning. But a person who "does not want to serve" in a guerrilla's army does *not* "share every one of [the guerrilla's] political beliefs." Specifically, such a person does not share the belief, which is the *sine qua non* of any

---

[20] *See* U.N. Doc. E/AC.32/SR.18 ¶ 10 (1950) (statement of Mr. Robinson—Israel); U.N. Doc. E/1618 Annex (1950).

[21] In the present case, the nexus may be established by deduction from the fact that, had Respondent not refused to serve, the feared persecution—*forced* conscription or other retaliation—would not have been threatened.

[22] The *Handbook* recognizes that "while the definition speaks of persecution 'for reasons of political opinion' it may not always be possible to establish a causal link between the opinion expressed" and persecution. *Handbook* at ¶ 81.

guerrilla group, that the guerrillas' cause is worth fighting for. The belief that a political objective is *not* worth fighting, killing and dying for is a political opinion that triggers the use of force by the guerrilla group.

Regardless of the precise characterization of an individual's motives, the conscious refusal to join a guerrilla group inevitably places the individual in *political* opposition to that group. "Refusal to bear arms, however motivated, reflects an essentially political opinion * * *; it is a political act." G. Goodwin-Gill, *supra* p. 13, at 34.[23] The drafters of the 1951 Convention clearly intended that " 'political opinion' should be understood in the broad sense, to incorporate * * * any opinion on any matter in which the machinery of state, government, and policy may be engaged." *Id.* at 31.[24]

Petitioner cites as support for its claim that Respondent did not fear persecution on account of *political opinion*, the fact that he did not "express[] any political opinion to the guerrillas." Pet. Br. at 29. However, verbal expression of political beliefs simply is not required under the 1951 Convention definition.[25] The *Handbook* specifically acknowledges "situations in which the applicant has not given any expression to his opinions." *Handbook* at ¶ 82. *See also* G. Goodwin-Gill, *supra*

[23] Of course, refusal to bear arms for reasons unrelated to the Convention may not provide a basis for a claim of refugee status. *See, e.g. Handbook* at ¶ 171. Political opinion is only one element of the refugee definition.

[24] This view comports with the plain meaning of the term "political opinion." *See The American Heritage Dictionary* 960 (2d College ed. 1982) (definition of "political" is "of, pertaining to, or dealing with the * * * structure or affairs of government, politics or the state"). Clearly an unwillingness to participate in the violent overthrow of a government constitutes an opinion pertaining to the "affairs of [that] government."

[25] Political opinions need not be and generally are not articulated in the form of sophisticated political science, and they need not rise to the level of being "entirely hostile," Pet. Br. at 11, to the opinion of the persecutor.

p. 13, at 31 ("[p]olitical opinions may or may not be expressed").[26]

Political opinions may be revealed in actions as well as in words. A refugee claim may be grounded "on evidence of engagement in activities which imply an adverse political opinion." J. Hathaway, *supra* note 3, at 152. The *Handbook* recognizes that political opinion may be implicit in conduct and that it may be necessary to look to "the root of [the applicant's] behavior * * *." *Handbook* at ¶ 81.

UNHCR instructs its field offices that political opinion need not be expressed in order to ground a claim for refugee status; political opinion may be imputed based on a refusal to join guerrilla forces: "[I]n the context of internal armed conflict * * * sometimes both the government and insurgent forces * * * cannot accept other than absolute commitment to their respective positions." Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum No. 138/89, Field-Office Memorandum No. 114/89 (Dec. 18, 1989). Consequently, guerrillas are likely to perceive those who refuse to join them as "anti-guerrilla." The class of political opinions which fall under the "refugee" definition thus cannot be limited only to those which are explicitly stated to the persecutor.

II. UPHOLDING THE NINTH CIRCUIT'S DECISION IN THIS CASE WILL NOT MAKE ALL "DISPLACED PERSONS" AND DRAFT EVADERS ELIGIBLE FOR ASYLUM.

Petitioner devotes considerable effort to showing that Congress did not intend to include within the purview of the Refugee Act persons fleeing generalized condi-

[26] Petitioner's approach would require asylum-seekers to present their oppositional political views expressly to potential persecutors. Nowhere does the 1951 Convention or 1967 Protocol require such behavior in order to make out a claim for refugee status.

tions of violence in their home countries. Pet. Br. at 16-21. Petitioner argues that unless its interpretation of the "on account of" language is adopted, such persons, whom Congress sought to exclude, would be eligible for asylum. Petitioner essentially contends that a holding by this Court that forced recruitment by a guerrilla group is persecution "on account of" political opinion would entail granting refugee status to all "displaced persons" fleeing war-torn countries. Pet. Br. at 21 (grant of refugee status in this case "would 'entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum' ") (citation omitted).

However, many persons fleeing conditions of violence in their native countries have never been forcibly recruited and may have no reason to fear that they will be individually targeted by either government or anti-government forces. Such persons may not be able to demonstrate a well-founded fear of individualized persecution. This case involves an individual who was specifically singled out for forced recruitment by armed guerrillas. Upholding the Ninth Circuit's decision in this case would not expand the protection of the Refugee Act to cover persons fleeing generalized conditions of violence. Affirmance in this case would, however, protect individuals who have been directly targeted by the guerrillas and who fear forced recruitment or punishment as a result of a refusal to join the guerrillas. Such individuals are not simply caught in the crossfire or seeking refuge from stray bullets; such persons are fleeing bullets aimed directly at them. Thus, Petitioner's concern regarding displaced persons is unfounded.

Likewise, the argument that upholding the Ninth Circuit decision would require that "draft dodgers" be granted asylum is unfounded. Petitioner claims that "[n]o principled distinction can be drawn between persons recruited by guerrillas and persons conscripted by governments," and that therefore, upholding the Ninth

Circuit's decision would make "draft dodgers" eligible for asylum. Pet. Br. at 22. Petitioner appears to advance the position that there is no distinction between conscription by a legitimate government and illegal forcible recruitment by guerrilla or para-military forces.

To the contrary, conscription by a legitimate government is easily distinguishable from forced recruitment by a guerrilla group, and the distinction is implicit in the *Handbook* interpretation of the 1951 Convention which existed at the time the Refugee Act was passed. The *Handbook* recognizes the right of States to enforce mandatory conscription laws. *See, e.g., Handbook* at ¶¶ 167-168, 171, 173. No such provision is made for groups lacking the legal authority to conscript.

Moreover, not all draft evaders fleeing a legitimate government's mandatory conscription laws can make out a claim for refugee status. Persons evading mandatory conscription by their governments are not refugees simply because they fear prosecution for the crime of draft evasion. *Handbook* at ¶ 167. Nor may such a person attain refugee status simply because he "disagree[s] with his government regarding the political justification for a particular military action." *Handbook* at ¶ 171.

The *Handbook* catalogues the specific circumstances that may provide a basis for refugee status in such cases, *Handbook* at ¶¶ 167-174, and these circumstances are limited. They include: (i) conscientious objection, *Handbook* at ¶¶ 170, 172; (ii) military action that "is condemned by the international community as contrary to basic rules of human conduct," *Handbook* at ¶ 171; and (iii) instances in which the individual would suffer disproportionately severe punishment for the offense on account of any of the five reasons enumerated in the refugee definition, *Handbook* at ¶ 169. Thus, the argument that granting refugee status to a person fleeing forced recruitment by a guerrilla group would require granting such status to *all* persons fleeing conscription—legal or otherwise—is entirely without merit.

CONCLUSION

For the foregoing reasons, *amicus* UNHCR urges that the decision of the Court of Appeals for the Ninth Circuit be upheld.

Respectfully submitted,

JULIAN FLEET
FERNANDO CHANG-MUY
Office of the United Nations
High Commissioner for
Refugees
1718 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 387-8546

Of Counsel:
GUY S. GOODWIN-GILL

ARTHUR L. BENTLEY, III *
ELISA C. MASSIMINO
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5739

* Counsel of Record

Attorneys for Amicus Curiae

August 14, 1991

** Melissa Crow, a New York University law student, assisted in the preparation of this brief.